Motion to dismiss or affirm

Post

15—B

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1143.

LOGAN O. SWOPE, PLAINTIFF IN ERROR,

vs.

HIRAM W. LEFFINGWELL, HENRY H. HONORÉ, CHAUNCEY I. BOWEN, JOHN W. DOANE, AND THE ATLAS NATIONAL BANK OF BOSTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED NOVEMBER 14, 1881.

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INDEX.

	Original.	Print.
Citation	*a*	1
Writ of error	*b*	1
Injunction order	1	2
Sheriff's return	1	3
Injunction bond	2	3
Amended petition	2	4
Answer	6	7
Judgment	8	9
Motion for new trial overruled	9	10
Appeal granted	9	10
Bill of exceptions	9	10
Deposition of Ed. P. Curtis—direct, 16 to 19—cross, 19 to 21—redirect, 21—recross	9	10
Deposition of W. H. Block	12	13
Exhibit A appended to Curtis' deposition (letter)	13	13
B appended to Curtis' deposition (letter)	13	13
C appended to Curtis' deposition (letter)	14	14
D appended to Curtis' deposition (letter)	14	15
E appended to Curtis' deposition (letter)	15	15
F appended to Curtis' deposition (letter)	16	16
G appended to Curtis' deposition (letter)	16	16
H appended to Curtis' deposition (letter)	16	16
Deed of Swope to Honoré	16	17
Agreement—Honoré with Swope	18	18
Deed of trust—Honoré to E. B. Sherzer and Swope	18	18
Honoré to Sherzer, trustee, &c., and Swope	21	18
Honoré to Sherzer, trustee, to A. McKinley	24	21
Trustee's deed—Sherzer, trustee, to L. O. Swope	28	24
Letter of J. W. Doane, dated December 19, 1874	31	27

with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 26th day of January, in the year of our Lord one thousand eight hundred and eighty-one.

Issued at office in the city of Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.]

M. M. PRICE,
Clerk of said Circuit Court.
By A. P. SELBY,
Deputy.

Allowed by—

T. A. SHERWOOD,
C. J. S. C. Mo.

STATE OF MISSOURI, *ss:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, in obedience to the mandate of the within writ, herewith transmit to the honorable Supreme Court of the United States at Washington, a full, true, & complete transcript of the record and proceedings in the within entitled cause as fully as same remain of record & on file in my office.

In testimony whereof I hereto set my hand and affix the seal of said court at office in the city of Jefferson, this 8th day of September, A. D. 1881.

[SEAL.]

HENRY W. EWING,
Clerk, Supreme Court of Missouri.

(Indorsed:) Swope vs. Leffingwell et al. Writ of error. Filed Jan'y 27th, 1881. H. W. Ewing, cl'k, by Chas. G. Guensher, D. C.

c STATE OF MISSOURI, *ss:*

Be it remembered that heretofore, to wit, on the first day of April, A. D. 1878, a transcript was filed in the office of the clerk of the supreme court of the State of Missouri, which is in the words and figures following, to wit:

STATE OF MISSOURI, *ss:*

Be it remembered, that heretofore, to wit, on the seventh day of February, A. D. 1877, there was filed in the office of clerk of the Saint Louis court of appeals, a transcript of the record and proceedings in a certain cause lately pending in the circuit court of St. Louis County, wherein Logan O. Swope was plaintiff and Hiram W. Leffingwell and others were defendants, which is in the words and figures following, to wit:

1 STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that heretofore, to wit, on the 19th day of July, A. D. 1875, there was filed in the office of the clerk of the circuit

court of St. Louis County a petition, upon the presentation of which petition to the court, the plaintiff was granted a restraining order against the defendants, a copy of which is attached to said petition, and is, with the sheriff's return thereon, in words and figures following, to wit:

Injunction order.

In the circuit of St. Louis County, June term, A. D. 1875, Monday, July 19th, 1875.

LOGAN O. SWOPE
vs.
HIRAM W. LEFFINGWELL, HENRY H. HONORE, Chauncey I. Bowen, John W. Doan, and persons unknown, claiming interest in three certain promissory notes executed by Logan O. Swope, dated December 26, '71, for $12,586.65; $11,946.65, and $11,306.65; due in 1, 2, and 3 years from date.

Now, at this day comes the plaintiff, by his attorney, and files a petition, duly verified by affidavit, praying for restraining order, which being duly heard and considered, it is ordered by the court that upon the plaintiff filing an injunction bond in the penal sum of twenty-five hundred dollars, with good and sufficient sureties, to be approved by the court, that the defendants and persons unknown, claiming an interest in three promissory notes described in the petition, executed by plaintiff, dated December 26th, 1871, for $12,586.65; $11,946.65, and $11.306.65; due in one, two, and three years respectively, from date; and their agents, servants, and employees be, and the same are hereby, enjoined and restrained from proceeding any further to enforce the deed of trust, and notes, or debt secured, thereby mentioned in the petition, being the deed of trust executed by said Logan O. Swope, dated December 26th, 1871, and delivered to defendant, Hiram W. Leffingwell, trustee, which deed is recorded in book 440, page 545 of the records of St. Louis County, by further advertising, or selling the property as advertised, until the further orders of this court. Bond filed and approved.

A true copy from the record.
Attest with seal of court:
[SEAL.] J. FRED THORNTON, *Clerk.*

Sheriff's return.

Executed this order in St. Louis County, on the 20th day of July, 1875, by reading the order to Hiram W. Leffingwell.

EMILE THOMAS, *Sheriff.*
By HENRY ERB, *Deputy.*

2 The bond above spoken of is in words and figures following, to wit:

Injunction bond.

Know all men by these presents, that we, Logan O. Swope, as principal, and Thomas H. Swope, and B. W. Alexander, as sureties, are

held and firmly bound unto Hiram W. Leffingwell et al., defendants, in the sum of twenty-five hundred dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated at St. Louis, this 19th day of July, A. D. 1875.

The condition of the above obligation is such, that whereas said Logan O. Swope, plaintiff, on the 19th day of July, A. D. 1875, obtained a restraining order or injunction against said Leffingwell et al.:

Now, if the said Logan O. Swope shall pay all damages that may be occasioned by said restraining order, or injunction, and abide the decision that shall be made therein, and pay all sums of money, damages, and costs that shall be adjudged against him, if the injunction or restraining order be dissolved, then the above obligation to be void; otherwise to be and remain in full force and virtue.

LOGAN O. SWOPE. [SEAL.]
THOMAS H. SWOPE. [SEAL.]
B. W. ALEXANDER. [SEAL.]

Approved by the court:

J. FRED THORNTON, *Clk.*

And, on the 8th day of November, A. D. 1875, the plaintiff by leave of court first had and obtained, filed the following amended petition, to wit:

Amended petition.

Plaintiff for this his amended petition, filed by leave of court, states that on the 25th day of May, 1872, he, by deed duly executed and delivered, conveyed to defendant, Henry H. Honore, the following described real estate, situate in the county of St. Louis, State of Missouri, to wit: Block number twenty-four (24) of Peter Lindell's second addition to the city of St. Louis, a plat of which said addition is of record in the recorder's office of St. Louis County; said block is bounded on the north by Lindell avenue, east by Vandeventer avenue, south by Baker avenue, and west by Sarah avenue, and containing fourteen acres, and being the same property acquired by plaintiff of Robert C. Gordon and wife by deed dated 26th of December, 1871.

That in part consideration of said conveyance, transfer, and sale, said defendant Honore, both for himself and defendant Chauncey Bowen, for whom, as plaintiff is informed and believes and so charges the fact to be, defendant Honore was also acting, and who, as plaintiff is informed and believes and so charges the fact to be, was associated with him, said Honore, in the purchase of said property, and was a partner with said Honore in said transaction, and interested therein; the title to said property having been, either for convenience or concealment, taken in the name of said Honore—agreed, promised, and undertook to assume a certain incumbrance
3 upon said property, being in the form of a deed of trust, dated December 26th, 1871, and recorded in the recorder's office of St. Louis County, State of Missouri, in book No. 440, page 545, made and executed by plaintiff, whereby and wherein he conveyed the property hereinbefore above described to defendant, Hiram W. Leffingwell, as trustee, among other things to secure the payment of his, plaintiff's, three certain promissory notes of even date with said trust deed, payable to the order of Robert C. Gordon, "cestui que trust" in said deed, in one, two, and three years after date respectively, the one due in one

year from date being in the sum of twelve thousand five hundred and eighty-six and $\frac{65}{100}$ dollars ($12,586.65), the other due two years from date, being in the sum of eleven thousand nine hundred and forty-six and $\frac{65}{100}$ dollars ($11,946.65), the third due in three years from date, being in the sum of eleven thousand three hundred and six and $\frac{65}{100}$ dollars ($11,306.65), all with interest from maturity at the rate of ten per cent. per annum and payable at the office of W. H. Leffingwell & Co., St, Louis, Missouri; the said trustee being, among other things, empowered, in case of a default in the payment of said notes, or either or any one of them, at maturity, at the request of the holder of said note or notes, to expose said property for sale at public vendue for cash, at the eastern front of the court-house door in the city of St. Louis, first giving twenty days notice of the time, terms, and place of sale and property to be sold, by advertisement in some newspaper printed and published in the city of St. Louis, and sell the same to satisfy said trust, and to satisfy and pay off the same at maturity, and also agreed to pay certain sums of money in addition therefore.

That to secure certain of said purchase-money for said land, said Honore, by deed duly executed, dated May 25th, 1872, conveyed the said real estate hereinbefore described, to Edwin B. Sherzer, in trust, to secure his, said Honore's, certain promissory note in the sum of eighteen thousand five hundred dollars ($18,500), evidencing said purchase-money—of even date with said deed payable to the order of plaintiff at the Third National Bank at St. Louis, Missouri, three years after date with interest at the rate of eight per cent. payable semi-annually, &c., in which said deed said trustee was empowered in case of a default in payment of said note at its maturity at the instance of the holder of said note to expose said property therein described, being the same hereinbefore described property—for sale at public vendue at eastern front court-house door in the city of St. Louis, State of Missouri, and sell the same to the highest bidder for cash, first giving twenty days public notice of the time, terms, place of sale and property to be sold, by advertisement in some newspaper printed in St Louis County, Missouri.

4 That default having been made in the payment of said note, so secured, said trustee did, upon request of the holder of said note, so expose the same for sale at public vendue, at the place in said deed mentioned, having first given the notice of sale required and in the manner required, and otherwise performed all the conditions mentioned in said deed required to such sale, at which sale plff. being the highest and best bidder for cash, the same was struck off to him, and in a short time thereafter a deed to said property was duly executed and delivered to him by said trustee, and he went into and is now in possession of the same.

That said notes executed by plaintiff as aforesaid and secured by said prior encumbrance or deed of trust of December 26th, 1871, are long since past due, and have been, as plaintiff is informed and believes and so charges the fact to be, at or after the respective dates of their maturity, paid off and satisfied as to this plaintiff, and the property above described by said Honore and said Bowen, or said Honore or Bowen who was interested in said purchase and associated with said Honore as aforesaid.

That notwithstanding that said notes, each and all of them, have been paid as aforesaid, said deed of trust still remains unsatisfied upon the records of the recorder's office aforesaid, and still appears as a valid and subsisting encumbrance upon said described property.

That defendants, Honore, Bowen, Doane, the Atlas National Bank of Boston, a corporation duly incorporated under the laws of the United States, or provisions of an act of Congress, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, A. D. 1864, and the several amendments thereto, and usually denominated the National Banking Act, and said trustee Leffingwell, though thereunto requested, refuse to enter satisfaction of said trust deed, or release said property from said encumbrance or execute a release thereto.

That defendants, in fraud of plaintiff's rights and against equity and good conscience, claim that said notes, though paid and satisfied as aforesaid, are still valid and subsisting demands and claims against plaintiff, and said property to be satisfied out of the same by sale under said deed of trust.

That defendant, Doane, as plaintiff is informed and believes and so charges, claims to have for value purchased said notes from or through said Honore and Bowen, and claims an interest in said property under said deed of trust, by virtue thereof, whereas, in truth and in fact, as plaintiff is informed and believes and so charges, said Doane, in making said purchase through said Honore or Bowen was at the time acting as agent of, and for the benefit and on behalf of said defendant, "The Atlas National Bank" of Boston, State of Massachusetts, which also claims an interest in said property as holder and owner of said notes secured by said deed of trust, as aforesaid, though under its act of incorporation it has no power to deal in, to take or hold the same, or property conveyed by said trust-deed, whether by way of security or otherwise. Plaintiff avers that said notes, if purchased, were bought by said Doane or said Atlas National Bank with full knowledge of plaintiff's equities therein, and that the same were paid, and long after their maturity and payment by said Honore and Bowen, as aforesaid; that neither said Doane nor said Atlas National Bank was nor is a bona fide purchaser nor holder for value of the same, or any part thereof; that neither of said defendants paid any value for the same. That, as plaintiff is informed and believes and so charges, the same are and were held by said defendants last named for the benefit of said Honore or Bowen or persons unknown to plaintiff, who, as plaintiff is informed and believes and so charges, also claim an interest in said notes, as owners thereof by intermediate transfers of the same through said Honore or Bowen, and who, if so transferred, as plaintiff is informed and believes and so charges, received and took the same with full knowledge of plaintiff's equities therein, and long after their maturity and payment, as aforesaid.

Plaintiff states that the holding of said notes by said Doane and said Atlas National Bank, and the alleged various transfers of said notes by and through said Honore and Bowen, was a part of a scheme and device on the part of said last-named defendants, and said other defendants with the exception of said Leffingwell, to give a show and pretense of validity to said notes against said property and said plaintiff, and to keep the same alive in fraud of plaintiff's rights as owner and in possession of said property.

Plaintiff states that said defendants, Honore, Bowen, Doane, the Atlas National Bank of Boston, and said unknown parties, claiming an interest in said notes, are non-residents of this State, as plaintiff is informed and believes. Plaintiff states that said defendant, Leffingwell, as trustee, and said Doane and said Atlas National Bank, of Boston, as holders of

said notes paid and satisfied, as aforesaid, under the pretense that default has been made in the payment of said notes, have in the St. Louis Daily Times, a newspaper printed and published in the city of St. Louis, State of Missouri, advertised said property for sale, to be sold on the 3d of August, 1875, a copy of which advertisement has been heretofore annexed to the first petition filed, to which reference is hereby made and made a part of this bill, whereby and in event [w]thereof a cloud would be cast upon plaintiff's title to said property, and he be without adequate remedy at law. Plaintiff prays that said parties so unknown claiming an interest in said property, as aforesaid, may be made parties to this bill; that said deed of trust, and debts and notes secured thereby, be
6 decreed satisfied and paid; that defendant Leffingwell and Doane and said Atlas National Bank, their agents and servants, be enjoined and restrained from proceeding to enforce said deed of trust, or debt or notes secured thereby, by farther advertising or selling said property under said deed; that the injunction as heretofore granted be continued, and for such other and further relief as may be just and necessary, and for general relief.

E. Z. SHERZER, *Pl'ff's Attorney.*

STATE OF MISSOURI,
St. Louis County, ss:

Logan O. Swope, of lawful age, being duly sworn, says that he is plaintiff in the above suit; that said Henry H. Honore, Chauncey I. Bowen, John W. Doane, the Atlas National Bank of Boston, and said persons unknown, claiming an interest in said notes, as stated, are non-residents of this State, to the best of his knowledge and belief; that the matters in the petition stated are true, to the best of his knowledge and belief, and that he has good reason to believe, and does believe, that the relief he prays for will be eminently endangered unless immediately granted and continued.

LOGAN O. SWOPE.

Subscribed and sworn to before me this 2d day of November, 1875. I duly qualified Jan. 15, 1872, and my term expires Jan. 11, 1876.
[SEAL.] J. Q. ADAMS FRITCHEY,
Notary Public, St. Louis Co., Mo.

To which amended petition the defendants, on the 15th day of December, 1875, filed the following answer, to wit:

Answer.

Defendants Hiram W. Leffingwell, Henry H. Honore, Chauncey I. Bowen, and John W. Doane, and the Atlas National Bank of Boston, for answer to petition of plaintiff herein say that as to whether, on the 25th day of May, 1872, or any other day, plaintiff executed and delivered a deed to Henry H. Honore for certain real estate in said petition described, defendants have no knowledge or information thereof sufficient to form a belief.

Deny that in part consideration for said conveyance said defendants, Honore and Bowen, as alleged, agreed, or promised, or undertook to assume a certain or any incumbrance upon said property, as alleged, and being in the form of a deed of trust, as alleged; deny that said Bowen was a partner of Honore in the purchase of said property, as alleged, and deny that said Honore was acting for said Bowen as al-

leged, and deny that the title to said property was taken in the name of said Honore, either for convenience or concealment, or for any such purpose as alleged. Defendants admit that the plaintiff did execute his three promissory notes payable to the order of R. C. Gordon,
7 as alleged, secured by deed of trust upon real estate, in said petition mentioned; but defendants say, as to whether the dates and amounts of said notes are correctly set forth, they have no knowledge or information thereof sufficient to form a belief.

Defendants further say, as to whether said Honore, by deed dated May 25th, 1872, or at any time, to secure note of eighteen thousand five hundred dollars, dated May 25th, 1872, being purchase money for said real estate, executed said deed in trust as alleged, they have no knowledge or information sufficient to form a belief.

Defendants deny that said notes of plaintiff have been paid off or satisfied by said Honore and Bowen as alleged, or by either of them. Deny that the claim of defendants or any of them, that said notes of plaintiff are valid and subsisting is in fraud of plaintiff's rights or against equity or good conscience as alleged. Defendants deny that said Doane purchased said notes through said Honore and Bowen as alleged. Deny that said notes were bought by said Doane with full knowledge, as alleged, or any knowledge of any equities of plaintiff's therein, as alleged, and deny that said notes were paid as alleged, and say that it is untrue that defendant Doane is not a holder for value, or a bona fide holder of said notes, as alleged, or that he paid no value for the same, and defendants say that said Doane is now the holder of said notes for collection for account of the Atlas National Bank of Boston; that said bank became a holder for value of said notes of plaintiff without notice of any of the alleged equities or rights of the plaintiff, touching the same, and that defendant J. W. Doane is now the holder of said notes for collection as aforesaid, without notice as aforesaid. Deny that said bank cannot hold, deal in, or take, or hold said notes or property conveyed by said deed of trust as alleged. Deny that said notes are held by said Doane for the benefit of said Honore and Bowen, or either of them, as alleged, or any persons in their interest as alleged, or that any persons through said Honore and Bowen claim any interest in said notes. Deny that said notes were taken, as alleged, after their maturity and payment as alleged.

Deny that the holding of said notes by said Doane, as alleged, and any transfers of said notes either by or through said Honore and Bowen or either of them was part of any scheme or device on the part of defendants, as alleged, to give a show or pretence of validity to said notes, or to keep the said notes alive in fraud of plaintiff's rights as alleged, and defendants say on the other hand, that the claim of plaintiff that said notes are paid, is a fraud upon the said defendants, and particularly upon the said Doane and the said Atlas National Bank. Deny that any parties have any interest in said not' except as hereinbefore stated. That said notes are, in fact, unpaid in
8 whole and in part, saving and excepting certain credits appearing upon the same, amounting to $3,936. That said notes are not and should not be declared satisfied—that plaintiff's prayer for an injunction should not have been granted—that said injunction should be dissolved and that defendants be hence discharged with their damages and costs.

NOBLE & ORRICK,
Att'ys for Def'ts.

And afterwards at the October and December terms, A. D. 1876, of said circuit court, the following further proceedings were had in said cause, to wit:

Judgment.

THURSDAY, *November* 2, 1876.

And this cause coming on to be heard by the court sitting in the trial of equity causes, the plaintiff and defendants appear by their respective counsel, and the cause is by them submitted to the court upon the pleadings and proofs, and the court being now fully advised of and concerning the same, doth order, adjudge, and decree as follows:

The court finding that the plaintiff executed the notes and deed of trust conveyed, and acquired the title to the real estate in the amended petition described, as therein alleged, and that said notes secured by the deed of trust therein mentioned which are as follows: One for $12,586.65, another for $11,946.55, and the third for $11,306.65, all executed by plaintiff, Logan O. Swope, payable to the order of Robert C. Gordon, and dated St. Louis, Mo., December 26, 1871, and due in one, two, and three years from date, with interest from maturity at the rate of ten per cent., payable at the real-estate office of H. W. Leffingwell & Co. (St. Louis Missouri), have been paid and satisfied by Henry H. Honore, one of the defendants herein, who, by virtue of the terms of his purchase of the real estate described in the petition and by his covenant with plaintiff, was bound in law to pay off and satisfy said notes.

And the court further finding that said defendant the Atlas National Bank of Boston, through defendant Doane, its agent, as in the petition alleged, acquired title to said notes and deed of trust, the first two after their maturity, as in the petition alleged, and all after their payment and satisfaction as aforesaid, with full notice thereof, and at the beginning of this suit, was and still is the holder thereof with full notice of the payment and satisfaction of the same as aforesaid.

And that said Atlas National Bank of Boston was and is a banking corporation organized and existing under and by virtue of the laws of the United States, or provisions of an act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide the circulation and redemption thereof," "Approved June 3d, A. D. 1864," and the several amendments thereof, and usually denominated the National Banking Act, and acquired
9 its title to said notes and deed of trust in violation of said act of Congress and without authority of law:

It is therefore ordered, adjudged, and decreed that the said notes and deed of trust have been paid, satisfied, and discharged, and are no longer a lien upon the real-estate described in the amended petition; that real estate is, and is hereby, discharged of the demand and lien contained in said notes and deed of trust; that the said Atlas National Bank of Boston has no authority whatever to assert said notes and deed of trust as a lien against said real estate, and that the injunction heretofore granted in this cause on the 19th day of July, 1875, be, and the same is hereby, made perpetual. And that plaintiff have and recover of the defendants, Hiram W. Leffingwell and the "Atlas National Bank" of Boston, his costs herein and have execution therefor.

Motion for new trial overruled.

TUESDAY, *December 5th*, 1876.

The motion for a new trial herein being heard and fully considered by the court is overruled.

Appeal granted.

FRIDAY, *February 2d*, 1877.

Now come the defendants, by their attorney, and file a bill of exceptions and also an affidavit for an appeal, and on his motion an appeal is allowed them to the St. Louis court of appeals from the judgment herein rendered. They thereupon file an appeal bond, which is approved by the court.

Which bill of exceptions, affidavit for appeal, and appeal bonds are respectively in words and figures following to wit:

Bill of exceptions.

Be it remembered that on the trial of this cause the following proceedings were had. The plaintiff to sustain the issues upon his part offered evidence, as follows:

1st. The deposition of Edward P. Curtis, which is as follows:

Deposition of Ed. P. Curtis.

EDWARD P. CURTIS, of lawful age, being produced, sworn, and examined, deposes and says:

My name is Edward P. Curtis. I am a resident of St. Louis. I am cashier of the National Bank of the State of Missouri in St. Louis; have been so about nine years. My duties are the usual duties of a cashier. The St. Louis Life Insurance Company were depositors in our bank. Our bank took charge of their collections and of their deposits.

Question. During the month of July, 1874, did the St. Louis Life Insurance Company, through your bank, send on for collection to New York or elsewhere a draft of said company on H. H. Honore; and if so, please state when the same was sent, and how sent, and what became of it.

On the 3d day of July, 1874, we discounted for the St. Louis Life Insurance Company their draft, dated July 2nd, 1874, upon H. H. Honore, New York, payable July 16th and 19th, 1874, for thirty-one
10 thousand six hundred and ten dollars and thirty cents. Attached to said draft were certain note or notes and deed of trust. Said draft and notes and deed of trust thereto attached were sent on the same day, July 3d, 1874 (see Exhibit A), to the National Bank of Commerce in New York for collection, with instructions to surrender the attached documents upon payment of draft. Said draft was returned under protest for non-payment, received here on the 22d of July, 1874, and on same day the same draft and the same documents attached were sent to the Atlas National Bank in Boston by letter dated 22d July, 1874. (Copy of letter is here produced marked Exhibit B.) And on the 27th July, 1874, they, the Atlas National Bank of Boston, advised us that they remitted thirty-one thousand six hundred and ten and $\frac{30}{100}$ dollars to the National Bank of Commerce in New York for the draft on H. H. Honore, same amount. (Witness here produces letter of 27th

July, a copy of which is hereto attached and marked Exhibit C.) Subsequently we had advice from the National Bank of Commerce confirming the advice from the Atlas National Bank of the 27th of the remittance of the said sum of money. (See Exhibit F, a copy of the letter.) We got money for the draft. I don't know whether it was paid or not. There was a draft alluded to in letter dated 22d July. My recollection is, drawn same as other, and to cover interest and protest. It was sent along with the other draft and was returned. The bank discounted this draft. It was not charged again against the insurance company when it was returned.

Question. When you discounted, what entries were made in the accounts of the insurance company at the bank?

(Objected to.)

Ans. It was passed to their credit, less the discount. It was indorsed as all drafts are. It might have been payable to my order. I have no recollection of it. When it was discounted the credit was passed to their cash account. After the return of the draft from New York under protest, the insurance company was notified of the fact that it was uncollected. * * *

Witness here produces copies of letters sent by the National Bank of the State of Missouri to the Bank of Commerce; also acknowledged copies of letters received from the Bank of Commerce dated July the 6th, 17th, and 20th. (See Exhibit D.)

Also copy of letters sent by the National Bank of the State of Missouri to the Atlas National Bank dated July 22d, 1874. (See Exhibit B.)

Also copy of letter dated July 28th from Bank of Commerce to National Bank of the State of Missouri (marked Exhibit F), and attached hereto.

Also a letter from Wm. H. Block, cashier, to E. P. Curtis, dated July 22, 1874. (See Exhibit G.)

Also letter of July 25th from Atlas B'k marked (Exhibit H).

Question. After it was returned protested what became of that paper?

That paper was then transmitted, with the draft for $80.31, to the Atlas National Bank of Boston, with the accompanying notes
11 and deed of trust. It was not charged at all on the books. It stood as originally made when it was discounted. It was not charged up to the life insurance company. It was still held by the bank. They were still held responsible on the draft, but before a settlement it was collected by sending on, at the suggestion of the life insurance company, to the Atlas National Bank. This paper (looking at paper marked Exhibit E) shows the manner of the original credit to the St. Louis Life Insurance Company to the draft. The Mound City Life was the former name of that company. This—Exhibit E—shows the only original entries on the book. In explanation of the credit having been made to the Mound City Life Insurance Company instead of the St. Louis Life Insurance Company, witness states that prior to the date of this transaction the name of the insurance company in question was changed from the Mound City Life Insurance Company to the St. Louis Life Insurance Company. The style of the ledger account, however, had not as yet been changed on our books.

age, and were by me carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was by me reduced to writing, in the presence of the witnesses, and from their statements, and after carefully reading the same to the witnesses they subscribed the same in my presence. And I do further certify that I am not of counsel nor attorney for either of the parties in said deposition and caption named, or in any way interested in the event of said cause named in said caption.

Qualified as notary Jan'y 21st, 1874. Commission expires December 15th, 1877.

Witness my hand and seal this 9th day of March, 1876.

[SEAL.] FIELDING MARVIN,
Notary Public, St. Louis County, Missouri.

(The following exhibits, called for in bill of exceptions, should be appended to deposition of Curtis, page 21:)

EXHIBIT A.

NATIONAL BANK OF THE STATE OF MISSOURI, IN ST. LOUIS,
St. Louis, July 3d, 1874.

RICH'D KING, Esq., *Cashier, New York:*

DEAR SIR: Inclosed herein for collection and credit:

* * * * * * *

A. M. Britton, V. p't, on H. H. Honore, $31,610.30, due 7-16, fixed with three notes, L. O. Swope, and deed trust securing same thereto attached, which please deliver upon paym't of d'ft.

* * * * * * *

Yours, resp'y,
(Signed) EDW. P. CURTIS, *Cashier.*

EXHIBIT B.

NATIONAL BANK OF THE STATE OF MO., IN ST. LOUIS,
St. Louis, July 22, 1874.

To the Cashier of the Atlas Nat'l Bank, Boston, Mass.:

DEAR SIR: I enclose herein for collection and remittance to
14 Nat'l B'k Commerce, N. Y., Britton, V. p't, on Honore..$31,610 30
" " 80 31

Also, three notes of L. O. Swope, with deed of trust securing same.

Upon paym't of the two d'fts, please surrender notes and deed of trust.

If not paid, please hold and advise us.

Yours, respectfully,

EDW. P. CURTIS, *Cashier.*

EXHIBIT C.

Capital, $1,500,000.] ATLAS NATIONAL BANK,
Boston, July 27, 1874.

EDW'D P. CURTIS, Esq.,
Cashier, St. Louis, Mo.:

DEAR SIR: Your favor of 22d inst. in received, with enclosures, as stated.

You have credit $

Respectfully, yours,

CHA'S L. LANE, *Cashier.*

I remit your credit with National Bank of Commerce in New York this day:

Our No. 8232	31,610 30
Draft on H. H. Honore	31,610 30

Draft $80.31 I return, as we have no orders to pay same. Mr. J. W. Doane will be here in a day or two, and will undoubtedly arrange it to your satisfaction. We thought it for your interest to accept pay for larger amount to-day.

EXHIBIT D.

NATIONAL BANK OF COMMERCE IN NEW YORK,
July 6.

E. P. CURTIS, Esq., *Cashier:*

DEAR SIR: Your favors of 1st, 2d, and 3d inst. have been received, with enclosures, as stated.

Very respectfully, yours,

RICH'D KING,
Ass't Cashier.

* * * * * * *

We do not find any mention of where the d'ft of H. H. Honore for 31,600.30 *kner* 6 July is to be presented. Please give us the necessary instructions regarding it. We cannot find his name in our directory.

NATIONAL BANK OF COMMERCE IN NEW YORK,
July 20, 1874.

E. P. CURTIS, Esq., *Cashier:*

DEAR SIR: Your favors of the 16th and 17th inst. have been received, with enclosures, as stated.

Very respectfully, yours,

RICH'D KING,
Ass't Cashier.

I return herewith the protested draft on H. H. Honore for $31,610.30; expenses, $1.31; and return also the documents attached to the d'ft.

NATIONAL BANK OF COMMERCE IN NEW YORK,
July 17, 1874.

E. P. CURTIS, Esq., *Cashier:*

DEAR SIR: Your favor of the 14th inst. has been received,
15 with enclosures, as stated.

Very respectfully, yours,

RICH'D KING,
Ass't Cashier.

I return also under protest—

* D'ft H. H. Honore, $31,610.30, exp's by f. $1.31. We hold the draft with collaterals a day or two, by suggestion of your president, waiting instructions.

EXHIBIT E.

No. 25039. 1874, date, July 3. To whom credited: Mound City Life Ins. Co. Endorsers: 3 notes of Logan O. Swope; 11,306.55, Dec. 29, '74; 11,946.65, Dec. 29, '73; 12,586.65, Dec. 29, '72, and deed of trust. St.

Louis Life Ins. Co., W. H. Block, cas. Drawer: A. M. Britton, V. pre'd'. Payer: H. H. Honore, N. Y. Date, 1874, July 2. Time when due: 1874, payable July 16. Days int. off, 14. Rate: 10 per c't. Ex. m'tg., $31,610.30. Sundry ac. Where sent: Com., N. Y. Advice, receipt of 7-23; date of, 7-20. Amount ret'd protested fees, 1.31. P. & L. cr., 122.91. A to K, cr. L to Z, cr., $31,487.39.

16 EXHIBIT F.

NATIONAL BANK OF COMMERCE IN NEW YORK,
July 28, 1874.

E. P. CURTIS, *Cashier:*

DEAR SIR: Your favor of 25th inst. has been received with enclosures, as stated.

Very respectfully, yours,

RICH'D KING,
Ass't Cashier.

I have received to-day for your account from Atlas Nat. B'k, Boston, $31,610.20.

EXHIBIT G.

HOME OFFICE, ST. LOUIS LIFE INSURANCE COMPANY,
(Corner Sixth and Locust streets,)
St. Louis, July 22, 1874.

E. P. CURTIS, Esq., *Cas.:*

DEAR SIR: I return you herewith our draft on H. H. Honore, New York City, $31,610.30, and hand you also our draft on same party for $80.31, which you will please send to the Atlas Nat. Bank, Boston, for collection.

The small draft is for interest, $79, and $1.31 protest fee on am't large draft, due July 16 to July 25, about the time when we suppose the paper will reach Boston.

Upon payment of these two drafts you will have the three notes, Logan O. Swope, and the deed of trust herewith attached delivered to party paying.

In case the paper is not promptly paid, you will please have it retained in Boston a week or ten days.

Respectfully,

WM. H. BLOCK, *Cas.*

EXHIBIT H.

Capital, $1,500,000.] ATLAS NATIONAL BANK,
Boston, July 25, 1874.

EDW'D P. CURTIS, Esq.,
Cashier, St. Louis, Mo.:

DEAR SIR: Your favor of 22 inst. is received, with enclosures, as stated.

You have credit $

Respectfully, yours,

CHA'S L. LANE,
Cashier.

I enclose for collection:

Honore not paid. We hold subject to your order. Cannot find that there is such a person in Boston.

4th. Also deed of Logan O. Swope to Henry H. Honore, dated May 25th, 1872, as follows:

Deed of Swope to Honore.

[U. S. rev. stamp, $80. L. O. S. June 24, 1872.]

This deed, made and entered into this twenty-fifth day of May, eighteen hundred and seventy-two, by and between Logan O. Swope, a bachelor, of the city and county of St. Louis, and State of Missouri, party of the first part, and Henry H. Honore, of the city of Chicago, county of Cook and State of Illinois, party of the second part, witnesseth: That the said party of the first part, for and in consideration of eighty
17 thousand dollars to him paid by the said party of the second part, the receipt of which is hereby acknowledged, does by these presents grant, bargain and sell, convey and confirm unto the said party of the second part, the following described tract or parcel of land, situated in the county of St. Louis, in the State of Missouri, to wit: Block numbered twenty-four (24) of Peter Lindell's second addition to the city of St. Louis, a plat of which said addition is of record in the recorder's office of St. Louis County. Said block is bounded on the north by Lindell avenue, east by Vandeventer avenue, south by Baker avenue, and west by Sarah avenue, and containing fourteen (14) acres, subject however, to a deed of lease, made and entered into the 19th day June, 1867, between Robert C. Gordon, as lessor, and John Lunbrecht, as lessee, wherein said described premises were leased to said lessee for the term of ten years from the first day of July, 1867, and also to a certain deed of trust made on the 26th day of December, 1871, by Logan O. Swope to secure the payment of three certain negotiable promissory notes by him executed, of even date with said deed of trust, one for the sum of twelve thousand five hundred and eighty-six and $\frac{65}{100}$ dollars ($12,586.65), due and payable one year after date; one for the sum of eleven thousand and nine hundred and fourty-six and $\frac{65}{100}$ dollars ($11,946.65), due and payable two years after date, and one for the sum of eleven thousand and three hundred and six and $\frac{65}{100}$ dollars ($11,306.65), due and payable three years after date, all of said notes being made payable to the order of Robert C. Gordon, and bearing interest after maturity at the rate of ten per cent. Said deed of trust being of record in recorder's office of St. Louis County, book 440, p. 545. The payment of all of which notes so secured, the grantee herein assumes, said payment being part of the consideration and purchase-money in this deed mentioned and named. To have and to hold the same, together with all rights, immunities, privileges, and appurtenances to the same belonging unto the said party of the second part, and to his heirs and assigns forever, the said Logan O. Swope hereby covenanting that he, his heirs, executors, and administrators, shall and will warrant and defend the title to the premises unto the said party of the second part, and to heirs and assigns forever, against the lawful claims of all persons whomsoever, saving and excepting those hereinbefore mentioned.

In witness whereof, the said party of the first part hereunto set *my* hand and seal the day and year first above written.

LOGAN O. SWOPE. [SEAL.]

Witness:

F. T. IYBHART.

REC. 1143—2

STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that on this twentieth day of June, A. D. 18 eighteen hundred and seventy-two, before me, the undersigned, a notary public within and for the county and State aforesaid, came Logan O. Swope, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as party thereto, acknowledged the same to be his act and deed for the purposes therein mentioned. In witness whereof, I have hereunto set my hand and notarial seal the day and year last above written.

EMILE GESSLER, [SEAL.]
Notary Public, St. Louis County, Mo.

Filed and recorded June 24th, 2.03 p. m., 1872.
W. C. KENNETT, *Recorder.*

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder for said county, certify the foregoing to be a true copy of an instrument in writing, executed by Logan O. Swope, together with the acknowledgment thereof, as fully as the same appears of record in my office, book 456, page 189.

Witness my hand and official seal this 3d day of June, A. D. 1876.
[SEAL.] D. W. MACADAM, *Recorder.*

5th. Also agreement of Henry H. Honore with Logan O. Swope, dated May 25th, 1872, as follows:

Agreement.—Honore with Swope.

Whereas I, Henry H. Honore, of the city of Chicago, Ill's, have this day, May 25th, 1872, bought of Logan O. Swope of the city of St. Louis, Missouri, the following described real estate to wit: Lot twenty-four (24) in Peter Lindell's second addition to the city of St. Louis, Mo., upon which there is a deed of trust made by the said Swope on the 26th day of December, A. D. 1871, to secure the payment of the sum of thirty-two thousand dollars and interest to one Robert C. Gordon, as evidenced by said Swope's three promissory notes in said deed of trust mentioned; now, therefore, for a good and valuable consideration to me made by said Logan O. Swope, I hereby agree and bind myself, my heirs, executors, and administrators, to pay off said notes and interest as they respectively become due, so that the said Swope shall be held harmless of the said debt and notes.

Witness my hand and seal, Chicago, Ill's, May 25th, 1872.
H. H. HONORE. [SEAL.]

21 Pages 19, 20, & 21, mistake.
Deed referred to above is as follows:

Deed of trust from Honore to Sherzer, trustee, &c., & Swope.

6th. Also deed of trust from Henry H. Honore to Edwin B. Scherzer, trustee of Andrew McKinley and Logan O. Swope, dated May 27th, 1872, as follows:

[U. S. rev. stamp $18¾. H. H. H., June 28, '72.]

This deed, made and entered into this 27th day of May, eighteen hundred and seventy-two, by and between Henry H. Honore, of the county of Cook, city of Chicago, and State of Illinois, party of the first part, Edwin B. Scherzer, of the city and county of St. Louis and State of Missouri, party of the second part, and Andrew McKinley and Logan O. Swope, of the city and county of St. Louis, in the State of Missouri, party of the third part, witnesseth: That the said party of the first part, for and in consideration of the debt and trust hereinafter mentioned and created, and of the sum of one dollar to him paid by the said party of the second part*y*, the receipt of which is hereby acknowledged, does by these presents grant, bargain, and sell, convey and confirm, unto the said party of the second part the following described piece or parcel of ground situated in the county of St. Louis and State of Missouri, to wit: Block number twenty-four (24) of Peter Lindell's second addition to the city of St. Louis, a plat of which *and* addition is of record in the recorder's office of St. Louis County. Said block is bounded on the north by Lindell avenue, east by Vandeventer avenue, south by Baker avenue, and west by Sarah avenue, and containing fourteen (14) acres, gan being same property acquired by said party of the first part of Loand O. Swope by deed dated the 25th day of May, A. D. 1872. This trust-deed is made expressly subject and second to two certain trust-deeds by me made heretofore, covering and conveying the above-described property further as follows: One trust-deed to Edwin B. Scherzer, dated the 25th day of May, 1872, to secure the payment of
22 my promissory note of even date therewith for the sum of eighteen thousand and five hundred dollars ($18,500.00), payable to the order of Logan O. Swope, due three years after date, with interest at the rate of eight per cent. per annum, payable semi-annually, principal and interest payable at the Third National Bank of St. Louis. The other of said two trust-deeds was made to Edwin B. Scherzer, dated the 25th day of May, 1872, to secure my promissory note of even date therewith for the sum of ten thousand and five hundred dollars ($10,500.00), payable to the order of Andrew McKinley, one *one* year after date, with interest at the rate of eight per cent. per annum, payable at the Third National Bank of St. Louis: To have and to hold the same, together with the appurtenances, to the said party of the second part and to his successors hereinafter designated, and to the assigns of him and of his successors in trust herein forever.

In trust, however, for the following purpose: Whereas the said Henry H. Honore, for part of the purchase-money for said above-described property, is justly indebted unto the parties of the third part on and to the amount of eighteen thousand and forty dollars (18,040.00), for which he, the said Henry H. Honore, has executed and delivered to said parties of the third part respectively his certain negotiable promissory notes, of even date, and further described as follows, to wit: One note for the sum of ten thousand and forty dollars ($10,040.00), and one note for the sum of four thousand dollars ($4,000.00), each due three years after date, each payable to the order of Andrew McKinley, at the Third National Bank of St. Louis, with interest at the rate of six (6) per cent. per annum on each of said notes, payable annually, and one note for the sum of four thousand dollars ($4,000.00), due three years after date, payable to the order of Logan O. Swope, at the Third National Bank of St. Louis, with interest at the rate of six (6) per cent. per annum, payable annually. And whereas, for the purpose of better securing said indebtedness, said Henry H. Honore, party of the first part, covenants and agrees with said parties of the third part, and each of them

and their assigns, that said property is now clear and free from all general and special taxes; that the same have always been and hereafter shall be promptly paid; and in case there should be any default in the punctual payment of the same at any time hereafter, said parties of the third part or their assigns, at their option, may pay same or redeem said property, and all amounts so expended shall become a debt due additional to the indebtedness aforesaid, and secured in like manner by this deed of trust.

Now, if said promissory notes shall be punctually paid at maturity, and if the covenants aforesaid shall be well and truly kept, and all amounts expended as aforesaid shall be refunded and repaid to said parties of the third part, or their assigns, by said Henry H. Honore or his legal
23 resentatives, then the property hereinbefore conveyed shall be released at the cost of the said party of the first part; but if said promissory notes or either of them shall not be paid at maturity, or in case payment of an amount expended as aforesaid should not be made, or in case said covenants or any part thereof shall not be fully kept, then this deed shall remain in force, and the said party of the second part, or in the event of his absence from the city of St. Louis, sickness, decease, or other disability or refusal to act, then the acting sheriff for the time being of the county of St. Louis, upon the request of the legal holder of said notes, his agent or attorney in fact, may proceed to sell the property hereinbefore described, or any part thereof, and all the right, title, benefit, and equity of redemption of said party of the first part therein given by the laws of the States of Illinois or Missouri, at public vendue, to the highest bidder, at the eastern front court-house door in the city of St. Louis, Missouri, for cash; first giving twenty days' public notice of the time, terms, and place of sale and of the property to be sold, by advertisement in some newspaper printed in the city of St. Louis, and upon such sale shall execute and deliver a deed or deeds in fee simple of the property sold, to the purchaser or purchasers thereof (and all statements in every such deed contained in relation to the execution of the trust shall in all courts of justice be held to be prima facie true), and receive the proceeds of sale; out of which shall be paid, first, the cost and expenses of this trust, and next, all amounts expended as aforesaid for taxes and other purposes as above mentioned, with interest thereon at the rate of ten per cent. from the time of their payment, and next, to the legal holders thereof the amounts due upon said notes, and the remainder, if any, shall be paid to the said party of the first part or his legal representatives. The trustee may act by agent or attorney in the execution of this trust. And the said party of the second part covenants faithfully to perform and fulfill the trust herein created.

In testimony whereof the parties have hereunto set their hands and seals the day and year aforesaid.

HENRY H. HONORE. [SEAL.]

STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

Be it remembered that on this twenty-second of June, eighteen hundred and seventy-two, before me, the undersigned, a notary public within and for the city of Chicago, in the county aforesaid, duly commissioned and qualified, personally came Henry H. Honore, who is to me personally known to be the same person whose name is subscribed to the foregoing instrument of writing as party thereto, and acknowl-
24 edged the same to be his act and deed for the purposes therein mentioned.

In testimony whereof I hereunto set my hand and notarial seal the day and year last above written.

[SEAL.] GEORGE C. CHRISTIAN,
Notary Public.

Filed and recorded June 28th, 11.15 a. m., 1872. W. C. Kennett, recorder.

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder of said county, certify the foregoing to be a true copy of and instrument in writing executed by Henry H. Honore, together with the acknowledgment and date of filing and recording thereof, as the same appears of record in my office, in book 456, page 219.

Witness my hand and official seal this fifth day of June, 1876.

[SEAL.] D. W. MACADAM, *Recorder.*

7th. Also, deed of trust from Henry H. Honore to Edwin B. Scherzer, trustee of Andrew McKinley, dated May 25th, 1872, as follows:

Deed of trust.—H. Honore to Scherzer, trustee of A. McKinley.

[U. S. S. $10.50. xxx June 24, '72.]

This indenture made this twenty-fifth day of May, in the year of our Lord one thousand eight hundred and seventy-two, between Henry H. Honore of the city of Chicago, county of Cook, and State of Illinois, party of the first part, and Edwin B. Sherzer, of the city and county of St. Louis and State of Missouri, party of the second part, and Andrew McKinley of St. Louis, Missouri, of the third part, witnesseth, that whereas the said Henry H. Honore is justly indebted to Andrew McKinley of said city and county of St. Louis, in the sum of ten thousand and five hundred dollars, and as evidence of which the said Henry H. Honore has executed and delivered to said Andrew McKinley his one certain promissory note, bearing even date herewith, payable to the order of said Andrew McKinley and further described as follows to wit: One negotiable promissory note of even date herewith for the sum of ten thousand and five hundred dollars ($10,500.00) due one year after date, payable at the Third National Bank of St. Louis, with interest at the rate of eight (8) per cent. per annum, which said note is given for part of the purchase-money for the premises hereinafter described. And whereas the said party of the first part is desirous of securing the prompt and full payment of said promissory note and the interest that may accrue thereon, in whose hands soever the same may be; now therefore, the said party of the first part, in consideration of the premises and for the purpose aforesaid, and in further consideration of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed, does hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns, and to his successor and successors in trust, his and
25 their heirs and assigns, all the following described lands and premises, situated in the county of St. Louis and State of Missouri, to wit: Block numbered twenty-four (24), of Peter Lindell's second addition to the city of St. Louis, a plat of which said addition is of record in the recorder's office of St. Louis County. Said block is bounded on the north by Lindell avenue; east by Vandeventer avenue; south by Baker avenue, and west by Sarah avenue, and con-

taining fourteen (14) acres, and being same property acquired by said party of the first part of Logan O. Swope by *date* of even date and delivery herewith. This trust-deed is expressly made subject and second to a certain other deed of trust made by n e, covering and conveying the above-described property to Edwin B. Sherzer of said city of St. Louis, dated even date herewith, given and made to secure my promissory note to Logan O. Swope of even date herewith for the sum of eighteen thousand and five hundred dollars, due three years after date, with interest at the rate of eight per cent. per annum, payable semi-annually, payable at the Third National Bank of St. Louis. To have and to hold the same, together with all and singular the tenements, hereditaments, privileges, and appurtenances thereto belonging to the said party of the second part, his heirs and assigns, and to his successor and successors in trust, his and their heirs and assigns forever. In trust, nevertheless, that in case default be made in the payment of either of the indebtedness or moneys aforesaid secured by this instrument, whether for principal or interest on the day on which the same or either thereof shall become due and payable, then, to sell and dispose of the said premises, and all the right, title, benefit, and equity of redemption of said party of the first part, his heirs or assigns therein, at public auction, at either door of any building which may be occupied as a court-house in the city of St. Louis, in the State of Missouri, or on said premises, as may be specified in the notice of such sale for the highest and best price the same will bring in cash, at least twenty (20) days' public notice having been previously given of the time and place of such sale, by advertisement in one of the newspapers at that time published in said city of St. Louis, and to make, execute, and deliver to the purchaser or purchasers at such sale good and sufficient deed or deeds of conveyance for the premises sold; and out of the proceeds or avails of such sale and the purchase-money paid thereon, after first paying all costs of such advertising and sale, including commissions such as are allowed by law to sheriffs on sale of real estate on execution, and all other expenses of this trust, including all moneys advanced for insurance, taxes, and assessments, or other liens, with the interest thereon, to pay the principal of said note whether due and payable by the terms thereof or not, and the interest due or accrued on said note up to the time of said sale, rendering the overplus (if any) unto the said party of the first part or his
26 legal representatives or assigns on reasonable request; and it shall not be obligatory upon the purchaser or purchasers at any such sale to see to the application of the purchase-money; which sale or sales so made shall be a perpetual bar, both in law and equity against the said party of the first part, his heirs and assigns, and all other persons claiming the premises aforesaid or any part thereof by, from, through, or under said party of the first part, or any of them; and in addition to the efficacy which such deed or deeds of conveyance might otherwise have in evidence as a muniment or muniments of title (and not in limitation or restriction of such efficacy), such deed or deeds shall also, as against the party of the first part, his heirs and assigns, and in favor of the party of the second part, his heirs and assigns, or his successor or successors in trust, his and their heirs and assigns, or the grantee or grantees named in such deed or deeds, his or their heirs or assigns, when produced in any court of law or equity, or elsewhere, be, and be taken as good and sufficient prima facie evidence, of the due and legal execution in all respects of the power of sale above granted, and of the due observance of all preliminaries and con-

ditions necessary to the validity of such sale and of such deed or deeds, specially or in detail recited or not; and any and all recitals which shall be made in such deed or deeds, shall in any court of law or equity, or elsewhere be, and be held to be, as against the party of the first part, his heirs and assigns, good and sufficient prima facie evidence of the truth of the matters and things therein recited. The said party of the first part hereby covenants, declares, and agrees that in case default shall be made in the payment of any or either of the indebtedness or moneys aforesaid, whether for principal or interest, or of the taxes hereinafter mentioned, on the day on which the same or either thereof shall become due and payable, or in the procuring, assigning, and disposing of the policies of insurance, as is hereinafter specified, then all and each of the moneys secured to be paid by this indenture, shall, upon any such default, become immediately due and payable, anything herein or in said promissory notes contained to the contrary notwithstanding; and the said party of the first part, for the purposes of enabling said party of the second part to make an advantageous and judicious sale of said premises, does hereby authorize and empower him to adjourn said sale from time to time on request of the legal holder of said notes at that time, at the discretion of said party of the second part, and also to sell said premises entire without division, or in parcels, as said party of the second part may think best; and the said Henry H. Honore, party of the first part, for himself, his heirs, executors, and administrators, covenants and agrees to and with the said party of the second part, his successor and successors in trust hereinafter named, and his and their heirs and assigns, that at the time of the ensealing and delivery of these presents, he is well seized of
27 said premises in fee simple, and has good right, full power and lawful authority to grant, bargain, sell, and convey the same, in manner and form as aforesaid; that the same are free and clear of all liens and incumbrances whatsoever, except as hereinbefore stated and set forth; that the said party of the first part will in due season pay all taxes and assessments on said premises, and exhibit once a year on demand, to said party of the second part, receipts of the proper persons, showing payment thereof, until the indebtedness aforesaid shall be fully paid; and in case said party shall fail to pay said taxes and assessments, then the party of the second part shall have full right, power, and authority to pay the same, and the amount so paid shall constitute a part of the debt secured by this instrument, and upon sale of the land hereunder, shall, with the amount of said note and interest, be paid to the holder of said note, with interest thereon at the rate of ten per cent. per annum. A reconveyance of said premises shall be made to said party of the first part, his heirs or assigns, at his or their own expense, on full payment of the indebtedness aforesaid, and performance by them of the covenants and agreements herein made by the party of the first part. And in case of the death, inability, or refusal to act of said party of the second part, then, the then acting sheriff of St. Louis County shall be, and he hereby is, appointed and made successor in trust to said party of the second part under this deed, with like powers and authority, and said premises shall thereupon become vested in such successor in trust, for the uses and purposes aforesaid.

In witness whereof, the party of the first part has hereunto set his hand and seal on the day and year first above written.

HENRY H. HONORE. [SEAL.]

Signed, sealed, and delivered in the presence of——

STATE OF ILLINOIS,
Cook County, ss:

Be it remembered that on this twenty-second day of June, eighteen hundred and seventy-two, before me, the undersigned, a notary public within and for the city of Chicago, in the county and State aforesaid, duly commissioned and qualified, personally came Henry H. Honore, who is personally known to me to be the same person whose name is subscribed to the foregoing trust deed, as having executed the same, appeared before me this day in person, and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and notarial seal this twenty-second day of June, A. D. one thousand eight hundred and seventy-two.

[SEAL.] GEORGE C. CHRISTIAN,
Notary Public.

Filed and recorded, June 24th, 1872, at 2.03 p. m. W. C. Kennett, recorder.

28 STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder of deeds for said county, certify that the foregoing is a true copy of an instrument of writing executed by Henry H. Honore, together with the acknowledgment and date of filing and recording thereof, as the same appears of record in my office, in book 480, page 257.

Witness my hand and official seal this 5th day of June, 1876.

[SEAL.] D. W. MACADAM,
Recorder.

8th deed of Edwin B. Scherzer, trustee of Henry H. Honore, to Logan O. Swope, dated June 23d, 1872, as follows:

Trustee's deed, Scherzer, trustee, to L. O. Swope.

This deed made and entered into this 23d day of June, eighteen hundred and seventy-five, by and between Edwin B. Serzer, of the city and county of St. Louis, State of Missouri, party of the first part, and Logan O. Swope, of St. Louis County, State of Missouri, party of the second part, witnesseth: Whereas, Henry H. Honoré, of the city of Chicago, Cook County, Illinois, by deed dated the twenty-fifth (25th) day of May, eighteen hundred and seventy-two, recorded in the recorder's office of the county of St. Louis, State of Missouri, in book 457, page 109, did convey to the said party of the first part, the following described real estate situated in the county of St. Louis, and State of Missouri, to wit: block numbered twenty-four (24) of Peter Lindell's second addition to the city of St. Louis, a plat of which said addition is of record in the recorder's office of St. Louis County. Said block is bounded on the north by Lindell avenue, east by Vandeventer avenue, south by Baker avenue and west by Sarah avenue, and containing fourteen (14) acres, and being same property acquired by said Honore of Logan O. Swope by deed dated May 25th, 1872, which conveyance was in trust for the following purposes therein named, to wit: To secure the payment of a certain negotiable promissory note, executed and delivered by said Honoré

to Logan O. Swope, of even date with said deed, (being for part of purchase money) due three years after date, with interest at the rate of 8 per cent. per annum, payable semi-annually, and bearing 10 per cent. per annum after maturity, payable at the Third National Bank in the city of St. Louis, and other purposes all of which are named in said deed. And whereas it was provided in said deed that if said promissory note should not be paid at maturity, the said party hereto of the first part might proceed to sell the property therein before described, (being the same above mentioned) or any part thereof, at public vendue, to the highest bidder, at the eastern front court-house door, in the city of St. Louis, Missouri, for cash, first giving twenty days' public notice of the time, terms, and place of said sale, and of the property to be sold, by advertisement in some newspaper printed in the city of St. Louis, and upon such sale, should execute and deliver a deed in fee simple of the property sold to the pur-
29 chaser or purchasers thereof. And whereas, the said Henry H. Honore did fail to comply with the terms of said deed, in this, to wit, that he failed to pay said note or any part thereof, at its maturity, but made default in payment thereof, whereupon the said party of the first part, being thereto required by the legal holder of said note so secured, did, on the 23d day of June, eighteen hundred and seventy-five, at the eastern front court-house door in the city of St. Louis, Missouri, between the hours of 10 a. m. and 5 p. m., proceed to sell the said property at public vendue, to the highest bidder, for cash, first having given at least twenty days' public notice of the time, terms, and place of said sale, and of the property to be sold, by advertisement published in the St. Louis Republican, a newspaper printed in the city of St. Louis, a copy of which, with an affidavit of Henry G. Paschall, one of the publishers, proving its publication, is hereto annexed, and made part of this deed; at which time and place the said party of the second part was the highest bidder for said property, at the price and sum of twenty-two thousand dollars, and the same was struck off to him accordingly: Now, therefore, in consideration of the premises, and of the said sum of twenty-two thousand dollars to him paid by the said party of the second part, the receipt of which is acknowledged, the said party of the first part hereby grants, sells, and conveys to the said party of the second part, all the right, title, and interest, estate, claim, and demand, of, in, and to the above-described property, which was vested in him by the above recited deed: To have and to hold the same, with all the rights, immunities, privileges, and appurtenances thereunto belonging, unto the said party of the second part, and his heirs and assigns forever. In witness whereof the said party of the first part has hereunto set his hand and seal the day and year above written.

EDWIN B. SHERZER, *Trustee.* [SEAL.]

STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that, on this 23d day of June, eighteen hundred and seventy-five, before me, the undersigned, a notary public in and for the county and State aforesaid came Edwin B. Sherzer, who is to me personally known to be the same person whose name is subscribed to the foregoing instrument of writing, as party thereto, and he acknowledged the same to be his act and deed, for the purposes therein mentioned. In testimony whereof I have hereunto set my hand and nota-

rial seal the day and year last above written. I was duly qualified Jan'y 15, 1872, and my term of office expires Jan. 11, 1876.

[SEAL.] J. Q. ADAMS FRITCHEY,
Notary Public, St. Louis Co., Mo.

30 STATE OF MISSOURI,
St. Louis County, ss:

I, the undersigned recorder for said county, certify that the within written conveyance was filed for record in my office June 7th, 1876, at 10.40 a. m., and is duly recorded in book 551 at page 53. Witness my hand and official seal at same date.

[SEAL.] D. W. MACADAMS,
Recorder.

STATE OF MISSOURI,
County of St. Louis, ss:

Personally appeared before the undersigned (a notary public within and for the county of St. Louis), who was duly qualified as such on February 3d, 1875, and whose term expires September 14th, 1878, Henry G. Paschall, who, being duly sworn, deposeth and saith that the annexed advertisement was published in the St. Louis Republican, printed within the said county and State (the newspaper of which he is one of the publishers), for twenty-three times, the first insertion being on the first day of June, and the last insertion on the 23d day of June, 1875, as follows:

1st time	June 1	13th time	June 13
2d time	2	14th time	14
3d time	3	15th time	15
4th time	4	16th time	16
5th time	5	17th time	17
6th time	6	18th time	18
7th time	7	19th time	19
8th time	8	20th time	20
9th time	9	21st time	21
10th time	10	22d time	22
11th time	11	23d time	23
12th time	12		

HENRY G. PASCHALL.

Sworn to and subscribed before me, this twenty-third day of June, 1875.

[SEAL.] D. G. JONES,
Notary Public, St. Louis County.

TRUSTEE'S SALE OF REAL ESTATE.—Whereas Henry H. Honore of the city of Chicago, county of Cook, State of Illinois, by his certain deed of trust, dated the 25th day of May, 1872, recorded in the recorder's office of St. Louis County, State of Missouri, in book No. 457, page 109, conveyed to the undersigned, trustee, the following described real estate, situate in the county of St. Louis, State of Missouri, to wit: Block number twenty-four (24) of Peter Lindell's second addition to the city of St. Louis, a plat of which said addition is of record in the recorder's office of said St. Louis County. Said block is bounded on the north by Lindell avenue, east by Vandeventer, south by Baker
31 avenue and west by Sarah avenue, and containing fourteen (14) acres, and being same property acquired by said Honore of Lo-

gan O. Swope by deed of even date with said deed of trust; which said conveyance was in trust to secure the payment of a certain note therein described, being for part of purchase money for said property. And whereas default has been made in the payment of said note: Now, at the request of the holder of said note, and in pursuance of the power in me vested by said deed, and under its provisions, I, the undersigned, will, on Wednesday, the 23d of June, 1875, between the hours of 10 o'clock in the forenoon, and 5 o'clock in the afternoon of that day, at the eastern front court-house door in the city of St. Louis, Missouri, proceed to sell the property hereinbefore described, and all the right, title, benefit, and equity of redemption of said Honore, therein given by the laws of the State of Illinois or Missouri, at public vendue, to the highest bidder, for cash, for the purpose of satisfying said note, costs, and expenses of executing this trust.

EDWIN B. SHERZER,
Trustee.

9th. Letter of J. W. Doane dated December 19th, 1874, in words and figures following:

Letter of J. W. Doane dated Dec. 19, 1874.

CHICAGO, *Dec.* 19, 1874.

THOS. H. SWIPE, Esq., *St. Louis:*

DEAR SIR: Your favor of the 13th inst. came to hand to-day, having been forwarded to me by Mess. Brown Bros. & Co., New York.

I hold the notes you speak of as collateral security on a loan due Jan. 14th, 1875. If the loan is not paid at maturity I should be very happy to sell the collateral to you.

Yours, very truly,

J. W. DOANE.

The following are copies of notes referred to by Doane, Lane, & Bowen in their depositions, and offered in evidence by defendants:

10th. Note of Chauncey T. Bowen to Henry H. Honore dated October 3d, 1874, as follows:

$32,500.00.] CHICAGO, *Oct. 3d*, 1874.

One hundred days after date I promise to pay H. H. Honore, or order, at the American Exchange Nat'l Bank, New York, thirty-two thousand five hundred dollars, for value received, with interest at the rate of ten per cent. per annum, after due, having deposited with them as collateral security for the payment hereof notes numbered 367, '8, '9, notes of Logan O. Swope as follows, viz., dated 26th December, 1871, one year, $12,586.65; Dec. 26th, 1871, two years, $11,946.65; Dec. 26th, 1871, three years, $11,306.56; all payable to the order of Robert C. Gordon, with deed of trust accompanying notes numbered
32 , which I hereby give the legal holder hereof authority to sell, or any part thereof, on the maturity of this note, or at any time thereafter, or before, in the event of the said securities depreciating in value, at public or private sale, at his discretion, without advertising the same, or giving any notice, and to apply so much of proceeds thereof to the payment of this note as may be necessary to pay the same, with all interest due thereon, and also to the payment of all expenses attending the sale of the said collateral security, and,

ber, eighteen hundred and seventy-one, by and between Logan O. Swope, of the city and county of St. Louis, and State of Missouri, party of the first part, Hiram W. Leffingwell, of the county of St. Louis and State of Missouri, party of the second part, and Robert C. Gordon, of the county of St. Louis, State of Missouri, party of the third part, witnesseth that the said party of the first part, in consideration of the debt and trust hereinafter mentioned and created, and the sum of one dollar to him paid by the said party of the second part, the receipt of which is hereby acknowledged, does by these presents grant, bargain, and sell, convey, and confirm unto the said party of the second part the following-described piece or parcel of ground situated in the county of St. Louis and State of Missouri, to wit: Block numbered twenty-four (24) of "Peter Lindell's second addition to the city of St. Louis," a plat of which said addition is of record in the recorder's office of St. Louis County. Said block is bounded on the north by Lindell avenue; east by Vandeventer avenue; south by Baker avenue; and west by Sarah avenue, and containing fourteen ($14\frac{00}{100}$) acres; and being the same property acquired by said party of the first part of Robert C. Gordon and wife by deed of even date and delivery herewith; to have and to hold the same, with the appurtenances, to the said party of the second part, and to his successor hereinafter designated, and to the assigns of him and of his successor forever; in trust, however, for the following purpose:

Whereas the said Logan O. Swope, for part of the purchase-money for the above-described property, is justly indebted to the said party of the third part in the sum of thirty-two thousand dollars, and has executed and delivered to the said party of the third part his three certain promissory notes of even date herewith, one for the sum of twelve thousand five hundred and eighty-six and $\frac{65}{100}$ dollars, due and payable one year after date; one for the sum of eleven thousand nine hundred and forty-six and $\frac{65}{100}$ dollars, due and payable two years after date, and one for the sum of eleven thousand three hundred and six and $\frac{65}{100}$ dollars, due and payable three years after date. Said notes are made payable to the order of the said Robert C. Gordon, for value received, negotiable and payable, without defalcation or discount, at the real estate office of H. W. Leffingwell & Co., with interest at the rate of ten per cent. per annum after maturity, interest at the rate of six per cent. having been added to the notes, and has also agreed with said third party, or his indorsees and assignees, to cause all taxes and assessments, general and special, to be paid whenever imposed upon said property, and within the times required by law. And if said agreement relative to taxes be not performed as aforesaid, then said third party, or his indorsees, may pay such taxes, and for their repayment for all moneys paid therefor, and interest thereon, these present' shall be a security in like manner and with like effect as for the payment of said notes.

Now, if said notes be paid when they become due and payable, and said agreement concerning paying taxes as aforesaid be faithfully performed as aforesaid, then this deed shall be void, and the property hereinbefore conveyed shall be released at the cost of the said party of the first part; but if default be made in the payment of said notes, any or either of them, when they become due and payable, or in the faithful performance of said agreement for paying taxes as aforesaid, then this deed shall remain in force, and the said party of the second part, or in case of his death, inability, or refusal to act, or absence from said city of St. Louis, when authorized to sell under these presents, and a

sale be desired by the holder of said notes, any or either of them, the' William B. Swan of St. Louis, Missouri (who shall thereupon become his successor to the title of said property, and the same become vested in him in trust for the purposes and objects of these presents, and with all the powers, duties, and obligations thereof), may proceed to sell the property hereinbefore described, or any part thereof, at public vendue, to the highest bidder, at the eastern front of the court-house, in said city of St. Louis, for cash, first giving twenty days' public notice of the time, terms, and place of said sale, and of the property to be sold, by advertisement in some English newspaper printed and published in said city of St. Louis (though any sale, when once duly advertised, may be adjourned without other notice than oral proclamation made at the time and place advertised, and any sale, so adjourned as aforesaid, may be again adjourned from time to time by oral proclamation made at the place advertised and at the time at which the last adjourned sale was to have taken place); and upon such sale, so advertised, or advertised and adjourned, shall execute and deliver a deed in fee simple of the property sold, to the purchaser or purchasers thereof (a recital wherein of the giving of such notice, and in case said William B. Swan sell, of the happening of any or either of the aforesaid events, making him successor herein, as aforesaid, shall be proof thereof), and receive the proceeds of said sale, out of which he shall pay, first, the costs and expenses of executing this trust, including compensation to the trustee for his services, and next to the payor thereof, upon the usual vouchers therefor, all moneys paid for taxes, as hereinbefore provided
36 for when not paid as hereinbefore agreed, and interest thereon at the rate of ten per centum per annum, from the times of their payments; and next, the notes aforesaid, in the order of their maturity, whether due or not, and the balance of said proceeds, if any, shall be paid to the said party of the first part, or his legal representatives. The trustee may act by agent or attorney in the execution of this trust. And the said party of the second part covenants faithfully to perform and fulfill the trust herein created.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

LOGAN O. SWOPE. [SEAL.]

[U. S. rev stamp, $36, cancelled.]

STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that on this, twentieth day of January, eighteen hundred and seventy-two, before me, the undersigned, notary public in and for said county and State, duly commissioned and qualified, came Logan O. Swope, who is personally known to me to be the person whose name is subscribed to the foregoing instrument of writing, as party thereto, and he acknowledged the same to be his act and deed for the purposes herein mentioned.

In testimony whereof, I have hereunto set my hand, and affixed my official seal, at office, in the city of St. Louis, the day and year last aforesaid.

[SEAL.]

WILLIAM B. SWAN,
Notary Public, St. Louis County, Mo.

STATE OF MISSOURI,
County of St. Louis, ss:

I, the undersigned, recorder in and for said county and State, do

Q. Are you the party named John W. Doane?
A. I am.
Q. How long have you known the defendants, Honore and Bowen?
A. I have known them by reputation say, ten or fifteen years.
Q. Personally, how long?
A. Personally, two or three years.
Q. What was your general business in October, 1872, and prior thereto, in Chicago?
A. I was one of the firm who were importers of teas and coffees.
Q. Was you doing other business, besides?
A. I was acting as *acting as* agent for the Atlas National Bank, of Boston, besides.
Q. For what purpose?
A. For the purpose of buying paper—commercial and other paper.
Q. How long had you been acting at that time in that capacity for said bank?
A. For two years and a half.
Q. Do you know the paper or notes in controversy in this suit?
A. I do.
Q. Will you look at the papers now shown you, marked Exhibits "A," "B," and "C," and state if they are copies, according to your best recollection, of the notes in question in the case?
A. Yes, sir; I can say they are; I have no doubt they are correct copies.
Q. When and from whom did you first learn of said notes?
A. Those three notes, the first I ever saw, they were sent to me by the Importers and Traders' National Bank, New York.
Q. When and from whom did you first learn of the existence of these notes?
A. From Mr. Honore, in October.
Q. The defendant, Honore?
A. From the defendant, H. H. Honore, in October, 1874; some part of the month of October.
39 Q. Please state what occurred between you and Honore at that time relative to said notes.
(Counsel on each side agree that all objections to questions an' answers for incompetency, irrelevency, or otherwise, are reserved; and all objections to such testimony are as well taken as if made at the time of taking.)
A. Mr. Honore came to me at that time and stated that he had previously purchased a piece of ground in St. Louis for which he had agreed to pay $80,000 or thereabouts. That he bought that property subject to an incumbrance of about $30,000, or these three notes, subject to about $30,000. He said that these three notes were owned by an insurance company in St. Louis, who had been carrying the notes or owned the notes; and that he had agreed to have them carried or taken by some one else at this time, and the time was up; said that they had been sent to the Bank of Commerce in New York for that purpose by this insurance company in St. Louis. And he came to me for the purpose of getting me to take these notes and carry them instead of the insurance company in St. Louis. He stated to me that there were three of these notes, two of which were due or overdue, and one yet to become due. He said to me that they were well secured; that the property was worth a hundred thousand dollars, and these were first liens. I told him that they were such a shape—it was such a matter that I did not care to take hold of; and he left the office. Sub-

sequently he called with Mr. L. B. Sidway, of Chicago, president of the Illinois Trust Company. Mr. Sidway stated to me that he knew this property perfectly well, and that it was a safe risk at that price, and he said he knew Mr. Albert Todd in St. Louis, whose opinion Mr. Honore showed me and gave me; and other opinions in St. Louis as to these notes being a first lien and as to the value of the property. Mr. Sidway said he would be glad to carry that paper if he was allowed to by the rules of his bank, and recommended me to take it. I finally told Mr. Honore if he would get Mr. Bowen to make his note for a corresponding amount to that of these, payable in four months, that I would take that on behalf of the Atlas National Bank, with these notes to be put up as collateral security. Mr. Honore consulted Mr. Bowen, I suppose; at any rate, he came afterwards and told me that he would accept my proposition, and he was very desirous that the matter should be attended to at once, and that the money should be paid over to the Bank of Commerce, as he had agreed that it should be about this time. The notes being in New York as I supposed, it being impossible to describe them in this collateral note, and Mr. Honore gave my clerk a blank note for this amount, filled up, payable at a certain place—payable in New York, I think, with a space left blank for the collateral notes—for the notes we were to take as collateral, to be put in when I got to New York and found out how they read exactly; how they were described. My clerk brought me this on my return from Geneva Lake one Saturday night at the Palmer House—brought me that blank note, and I left Saturday night for New York. In the mean time I telegraphed the Atlas National Bank to honor my draft in New York for the amount of thirty-two or thirty-three thousand dollars; and I left that night for New York. I immediately went to the Bank of Commerce and found that the notes had been sent back to St. Louis. I telegraphed Mr. Honore that the notes had been sent back, and that if he still wanted to make the negotiation, that the insurance company in St. Louis must send them directly to the Atlas Bank; that I would be there and would make the negotiation there. I left that night or the next night for my residence in Thompson, Connecticut; and while I was there, perhaps Friday, I had a dispatch from Mr. Honore saying that the notes had been forwarded to the Atlas National Bank. I will give you this whole story just as it happened.

Q. Have you got the telegram?

A. I haven't got the telegram unless I may have it among my papers. I don't know; probably not. That being Thursday or Friday I expected to go to Boston on Monday; and I supposed that would be in season for the note to arrive there. On Saturday night the president of the Atlas National Bank came to my residence to spend the Sunday with me and left Monday morning for Boston; and when he went away from my place I gave him this blank note—took it out of my pocket and gave him this blank note and told him that when he got to Boston if these notes were sent there and that they were to the amount I had stated and described as well as I could, that he could take the notes and make this loan; take this Bowen note, fill in the collaterals, and pay the St. Louis insurance company the proceeds for these notes. The next that occurred in regard to this loan, I went into Boston two or three days afterwards, and went to the Atlas National Bank; called there as I always do. They said to me when these notes had been presented with a draft, I think, on Mr. Honore, before the president returned to Boston, before they received the note from me, and allowed that to be sent back to the bank which presented them; it was a draft from the vice-

president of the insurance company or the bank in St. Louis, as I understood it, on Mr. Honore; they said there were two drafts, one for the amount of the notes, thirty-two or thirty-three thousand dollars, and another for eighty dollars for interest. They paid the large one and allowed the small one to be returned. Nothing more transpired until the maturity of that note, the four months' note of Mr. Bowen. A few days before that matured Mr. Honore came around and wanted to know if that could be extended further, if that note could be renewed; and we agreed upon terms upon which it should be renewed; and a second note of Mr. Bowen's was sent down to the Atlas National Bank. A second
41 note was sent to the Atlas National Bank for the same time, made out for four months. Before that last note became due it was forwarded with three collateral notes to the Importers and Traders' Bank in New York; it was because the Bowen note was to be paid there, and, while there, there was one of the Swope notes fell due, I think in December, and sent out by the Importers and Traders' Bank to St. Louis for payment; it remained at the Importers and Traders' Bank until Mr. Bowen's note became due, and not paid, then the Importers and Traders' Bank sent them to me—sent the whole thing to me, and I requested Mr. Bowen to take up the note. Mr. Bowen stated that Mr. Honore was in St. Louis trying to make a negotiation for some one else to take these notes, and if so, the notes would be paid in a few days—a few weeks at any rate; it ran along in that way for two or three weeks or more. Finally I told Mr. Bowen I had waited a reasonable length of time and he must pay or else we should sell out the collaterals. I think we waited until June or July, and we then advertised those notes here in the Inter-Ocean. I think I was away at the time, but my clerk bid them in for the Atlas National Bank at $20,000, and by instructions of the Atlas National Bank I sent him with the notes to St. Louis or gave them to Mr. White, and he sent my clerk to St. Louis to confer with the trustee to make a contract with him as to the price of sale of the property, and to advertise and sell them under the instructions of the Atlas Bank; that was done, and a bill was filed by some one to prevent the sale. I think that is about all I know about the matter.

Q. When and where did you first see the notes in question?

A. When they were sent to me from the Importers & Traders' National Bank.

Q. When was this?

A. I think it was about May.

Q. About May of what year?

A. This year—1875.

Q. You did not see them, then, about the time you speak of when you was in Boston in 1874?

A. No; I don't remember that I did.

Q. Did you, at the time you spoke to Mr. Honore about securing Mr. Bowen's note, know that Mr. Bowen had anything to do with the property?

A. I knew that he had not. I knew Mr. Honore told me that he had not.

Q. You had no knowledge then in the matter?

A. I had no knowledge that he had any interest in the property.

Q. No knowledge about the matter further than what Mr. Honore told you?

A. None at all.

Q. This blank note that was filled up, what kind of a note was that? What do you call it?

A. An ordinary collateral note—printed form.

Q. Whose name was signed to that note?

A. Chauncey T. Bowen's.

Q. To whose order was that note made?

A. To his own order or to that of H. H. Honore, I cannot say which.

Q. What became of that note?

A. That note was taken up by another one being made in January.

Q. Are you not mistaken as to the time these notes were given for; was it not three months instead of four?

42 A. I am positive; as far as the first note is concerned I am positive, and I am quite sure as to the second. It is in existence. I am quite sure they were both four months' notes, as I recollect it.

Q. Who advanced the money, the $32,500 that was paid for these notes?

A. The Atlas National Bank.

Q. Did they have any negotiations with either Mr. Honoré or Mr. Bowen in this matter?

A. Not at all.

Q. Under what arrangement did they make this advance?

A. Under my arrangement with Mr. Honoré.

Q. What reason was there that you didn't take these notes themselves as security for the money advanced instead of demanding Mr. Bowen's note?

A. Because the bank had instructed me to buy nothing but paper running four months and less; one of these notes being longer and the over due, they were not in the shape for the bank to take them, and as a matter of convenience to the bank, I suggested to Mr. Honoré that if he could get this note from Mr. Bowen that in that way I would make the negotiation to comply with the order of the bank.

Q. What security, if any, did you rely upon in making this loan; was it the note of Mr. Bowen or the notes in question?

A. It was altogether upon the notes in question; it was in the property. I would not have loaned Mr. Bowen or Mr. Honoré money without security.

Q. You don't now, you say, recollect what became of that telegram you received from Mr. Honoré?

A. I do not.

Q. Do you know personally from whom the Atlas Bank received these notes, of your own knowledge?

A. Not personally, only what the cashier told me.

Q. Did you have any negotiations with the insurance company directly relative to these notes?

A. Not at all.

Q. Did you have any communication with them at the time or the Atlas Bank, so far as you know?

A. I don't know as to the Atlas Bank—none on my part.

Q. Do you know to whom these notes were sent by the insurance company, to whom they were sent in Boston by the insurance company?

A. I do not.

Q. Before making this arrangement had you any valuations upon the property in question?

A. I had.

Q. What became of these valuations?

A. They were given up to Mr. Honoré when he undertook to get some other parties to carry these notes in St. Louis.

Q. When was that?

A. That was at the time the second note matured—May, I think.

Q. Had you any opinion as to the title to this property at the time you made this negotiation?

A. I had one from Mr. Albert Todd; that is the one I relied upon. I was told he was an eminent lawyer there, and was to St. Louis what the best attorney was to Chicago. Mr. Sidway stated that.

Q. What became of the opinion of Mr. Todd's?

A. That went with the abstract back to St. Louis, to Mr. Honoré, or to some parties in St. Louis.

Q. Do you know where they are now?

A. I do not.

Q. When did you first see the trust-deed that secured these notes in question?

A. When I saw the notes.

43 Q. Did the abstract you refer to show the trust-deed?

A. Mr. Albert Todd stated so in his letter; and another gentleman by the name of McKindley, in his letter, stated so. Stated that the abstract did show—they had examined the abstract and it did show these notes to be a first lein upon the property. I never went through the abstract myself, but relied upon these gentlemen's letters.

Q. To show that the trust-deed so securing these notes——

A. Was a first lien on the property.

Q. At the time that you made this arrangement had you any knowledge that said notes or either of them had been paid, or any payments made upon them other than what appears thereon, if any?

A. I didn't see the notes to know that, but I was told there was two notes over due.

Q. Paid or unpaid?

A. Unpaid.

Q. At the time you made this arrangement had you any knowledge that the plaintiff in this case had paid certain notes in question or either of them, that is, Mr. Swope?

A. I was told none of them had been paid.

Cross-examination of J. W. Doane.

Cross-examination by Mr. OTIS:

Q. Mr. Doane, to whom do the originals of these notes belong?

A. To whom?

Q. Yes; now.

A. The Atlas National Bank.

Q. Have you any interest in them whatever?

A. Not the slightest.

Q. Did you ever have any interest in them personally?

A. Not one cent.

Q. How many years have you been in business in Chicago?

A. 21.

Q. Resided here most of the time?

A. All the time excepting summers; my family reside East in the summer time.

Q. What has been your business?

A. Wholesale grocers, until within a few years. I have been importing more recently, the last few years.

Q. What firm were you connected with during that period?

Always been J. W. Doane & Company, for 21 years.

Q. You have been the head of the establishment?

A. Yes, sir; I have had that honor.

Q. Had charge of its business affairs?

Yes, sir; altogether.

Q. You stated that you made the acquaintance of Mr. Bowen and Mr. Honoré about two years ago.

A. Personally?

Q. Yes.

A. Yes, sir; never knew them to speak to them.

Q. You knew Mr. Honoré by reputation?

A. Yes, sir; very well, very well, for fifteen years I should say.

Q. You knew, Mr. Doane, what his condition was in October, 1874, didn't you?

A. I thought so.

Q. You knew that Mr. Honoré was very much embarrassed?

A. I thought so.

Q. Did you know anything about Chauncey T. Bowen's circumstances at that time?

A. I thought he was pretty good.

Q. His credit stood——

A. Pretty good—pretty fair.

Q. But isn't it a fact that you knew that Mr. Honoré's credit was very bad in 1874, and has been ever since the panic?

A. As to his ability to pay?

Q. As a fact, as a man dealing in paper, wouldn't you regard Henry H. Honoré's name on paper rather as an injury to it than otherwise?

A. I should not count it—I should not for the last two years.

44 Q. Would not at that time, would you?

A. No; I would not loan him any large amount of money; if he had wanted five hundred dollars on his honor, or anything of that kind, I should have been glad to let him have it, but would not take his note.

Q. You didn't consider he had any credit at all?

A. Only as a man; I considered him entitled to as good credit as anybody, his word as good as anybody's, but not his note, and he acknowledged that himself to me.

Q. How long had you been acting as the agent of this bank?

A. Two years and a half.

Q. You had no interest in making this loan except to get your commission?

A. I never got a cent. I have done business with them for two years and a half without one cent of reward.

Q. That bank is a national bank?

A. Yes, sir.

Q. How was the first interview between yourself and Mr. Honoré brought about; did you approach him or did he approach you?

A. He called on me.

Q. Whereabouts?

A. In my office.

Q. In Chicago?

A. Yes, sir.

Q. You have no other place of business than in Chicago?

A. No other.
Q. Will you fix the time as near as you can?
A. October—I cannot say as to the day or month.
Q. 1874?
A. Yes, sir.
Q. You remember the circumstances?
A. Perfectly.
Q. Who else was present, Mr. Doane, at that interview?
A. No one, to my recollection.
Q. Was your bookkeeper present?
A. No, sir; I have a little office, very small, very rarely any one there; there may have been, but I don't remember any one else there.
Q. So that what took place there occurred between yourself and Mr. Honoré alone.
A. Yes, sir; alone.
Q. Did Mr. Honoré say that he knew of your relation to the Atlas Bank?
A. Well, he knew that I was buying a good deal of paper, and came to me on that account, I suppose; as a fact, that was not the only trade that I had had.
Q. With Mr. Honoré?
A. No, sir.
Q. When did your negotiations with Mr. Honoré first commence in this line?
A. I don't remember. I never had a great number of them, but a few, perhaps three months, three or four months; I don't remember.
Q. Prior to this transaction?
A. Yes, sir.
Q. So that Mr. Honoré knew that you were buying paper?
A. Yes, sir.
Q. Did you tell him who you were buying it for?
A. Yes, sir.
Q. He knew at the time?
A. I don't know how soon I told him that; I bought a great deal of paper without saying anything about that, but I don't know whether I did in this case or not. In this case I did, whether I did previously I don't remember.
Q. You told him you were buying this for the Atlas Bank?
A. Yes, sir.
Q. What papers did Mr. Honoré show you at this first interview?
A. Not any.
Q. How much did Mr. Honoré want to borrow?
A. Thirty-two or three thousand dollars; he didn't want to borrow it, but he wanted to make this negotiation; he wanted to get these notes carried for that amount.
Q. Won't you state now, the conversation you had with Mr. Honoré what he said to you, just as near as you can, Mr. Doane?
45 A. I cannot state it any better than I have already. I stated then as near as I could recollect it.
Q. Did your conversation at that interview have exclusive reference to these notes now in controversy?
A. Yes, sir.
Q. No other transaction spoken of?
A. Not that I remember of, there might have been.
Q. Did he show you any paper at that interview?
A. Not at all.

Q. How long did that interview last, Mr. Doane?

A. I could not tell; perhaps half an hour.

Q. How did Mr. Bowen's name become mixed up in the matter?

A. Mr. Bowen's name was not mixed up at that time, but after Mr. Sidway had told me this property was perfectly good, and that this was the first lien, and about the reputation of Mr. Todd, who had written a letter—that is—had a subsequent interview—I then suggested to Mr. Honoré myself, he wanted to borrow money, that is, he would like to borrow the money on those notes, and put up his own note. I told him I could not do that, I declined to do that, but if he could get Mr. Bowen's note for the amount, I would make the negotiation.

Q. At the first interview you declined to have anything to with it? Yes, sir.

Q. What payments did Mr. Honoré say had been made on these notes?

A. None at all, that I remember of. He told me; I think it was Mr. Swope's brother, I think he said, had been anxious to buy these notes of the insurance company in St. Louis; these notes were owned by the insurance company. He stated that Mr. Swope's brother, I think he said, had been anxious to buy these notes, but he didn't want him to buy them, he wanted to control them himself.

Q. And applied to you to carry them?

A. Yes, sir.

Q. So that you could act in his interest in the foreclosure?

A. Not in his interest at all; I could have those notes, and he would give me Mr. Bowen's note, or get Mr. Bowen's note, and if he got Mr. Bowen's note, I told him I would make the negotiation.

Q. About how soon after the first interview was it that Mr. Honoré called with Mr. Sidway?

A. I should think it was the next day.

Q. Did he produce any papers at that time?

A. I think he did.

Q. What were they?

A. Mr. Todd's letter; the abstract, and a letter from Mr. McKindley, I think.

Q. Did you examine the abstract at all?

A. No, sir; I did not. I examined the letter; I went on the letter more than anything else. I hadn't time to examine the abstract. Mr. Todd said he examined it, and Mr. McKindley and I relied upon those letters more than I did the abstract, and I relied upon what Mr. Sidway said about Mr. Todd.

Q. About his being a reliable and a responsible man?

A. Yes, sir; I went on him; I would not have undertaken to make the arrangement, if it hadn't have been backed up by a man like Mr. Sidway; that is the property.

Q. Did Mr. Honoré say to you that he could get Mr. Bowen's note?

A. He said he would try.

Q. How did Mr. Bowen's name come to be mentioned at this interview at all?

A. I knew that Mr. Bowen had been in the habit of accommodating Mr. Honoré in that way; in fact, he had done it with me.

Q. In other transactions?

A. Yes, sir.

Q. He had made his note?

A. He had accommodated Mr. Honoré with his name some way, and

I was satisfied that Mr. Bowen was tolerably good, or middling good, any way with his note; I went on securities all the time, but I wanted his note to make it convenient to the bank, to come within their limits to me. Their instruction' to me were to buy paper four months and under; I could not buy paper that was over due, I could not buy paper that had any longer than four months to run, I did that simply to make it convenient and to comply with the bank's request, and nothing more.

Q. Have you the collateral note here, Mr. Doane—the first one?

A. No, sir; the first one was given up when we took the second one.

Q. Do you know where it is now, sir?

A. I presume Mr. Bowen destroyed it or reserved it; it was given up to Mr. Bowen.

Q. It is not in your possession?

A. It is not.

Q. To whose order was that payable?

A. I could not say whether it was to his own order or to the order of Mr. Honoré.

Q. Mr. Honoré's name was on the paper, was it?

A. I could not say.

Q. What was the exact amount of that note?

A. Thirty-two thousand five hundred dollars.

Q. Just $32,500?

A. Just exactly.

Q. This collateral note was given to you, was it?

A. It was handed to me at the Palmer House by my clerk.

Q. How soon after this arrangement was made, Mr. Doane?

A. Well, I was up on an excursion to Geneva Lake a couple of days.

Q. In October, of last year?

A. Yes, sir.

Q. Did you take that note with you to New York?

A. I did.

Q. What was your arrangement with Mr. Honoré about it—that you should honor the draft of the insurance company for the amount of this note?

A. No; there was no arrangement about the draft or anything of the kind. The idea was that these notes were to be sent; these notes were already in the Bank of Commerce.

Q. In New York?

A. Yes, sir. I was to go there and take those notes up; buy those notes, take those notes, and I should fill them in as a collateral security to Mr. Bowen's note of thirty-two thousand five hundred dollars.

Q. You already having in your possession Mr. Bowen's note for thirty-two thousand five hundred dollars?

A. Yes, sir; made out in blank.

Q. Will you produce, and annex to your deposition, as near as you can, a copy of the first collateral note, just as you received it from Mr. Bowen and Mr. Honoré?

A. Yes, sir; an ordinary form, giving power to sell collaterals; the printed form.

Q. You say nothing was in it describing what kind of collaterals you received?

A. No, sir; I had been told there were three notes, but I didn't know the exact description.

Q. You knew two of them were past due?

A. Two of them were past due.

Q. The letters of Mr. Todd, and of this Mr. Kindley of St. Louis, stated when the notes matured, did they?

A. I think they did; I think the contract would show that,
47 and they stated the abstract was brought down to that point; that it was a first lien.

Q. Showed that one of these notes must have been due in December, 1872, and another in December, 1870?

A. Yes, sir; I think that showed, I would not be certain about dates, but I understood that two of them was past due paper.

Q. You went directly to New York?

A. I went directly to New York?

Q. You were to go to the bank and pay for these notes?

I was to go to the bank and ask them to pay.

Q. You were holding in your hands the note of Chauncey C. Bowen?

A. Yes, sir.

Q. Which you had received by virtue of this negotiation with Mr. Honoré?

A. Yes, sir.

Q. The paper was not in New York, it had been returned, as I understand?

A. It had been returned to St. Louis.

Q. How did Mr. Honoré say it got to New York, first?

A. He stated that the insurance company at St. Louis had sent it down there.

Q. How; for what purpose?

A. To be taken up by some one, and carried in the same way that they were carrying it, exactly.

Q. That he had made negotiations with other parties?

A. That he was going to try to make negotiations with other parties, and if he did, the paper was to be taken and carried.

Q. So he wanted to get it in New York?

A. He ordered it there, I suppose. I was told it had been there, and been sent back.

Q. You stated that the paper was then ordered from St. Louis to Boston, to be sent direct to the Atlas National Bank?

A. Yes; I suppose so. I telegraphed Mr. Honoré that the paper was not at the Bank of Commerce; that if the St. Louis Insurance Company would have it sent to the Atlas Bank, that the arrangement would be carried out.

Q. You retained possession all this time of the collateral notes?

A. Yes, sir.

Q. Who was the president of the bank?

A. Mr. M. D. Spaulding.

Q. How soon after was it you had an interview with Mr. Spaulding?

A. The very next Saturday or Monday—he came to my house to stay over Sunday—the very next Sunday.

Q. Did you explain the transaction with Mr. Honoré to him at that time?

A. I stated that I had made this negotiation. I don't know as I mentioned any names to him; he didn't know anything about names.

Q. Had you previously written to the Atlas National Bank?

A. Not at all, except I had telegraphed them to honor my check in New York.

Q. That is all you said?

A. That is all I ever said, and that is all they knew about it; and they had telegraphed to the Importers & Traders' Bank to honor it, and

if I had found the paper there all satisfactory, I should have used the check.

Q. Did you give the president of the bank that collateral note when he was down there?

A. I did.

Q. He took it back with him to Boston?

A. Yes, sir.

Q. How soon did you go up to Boston after that?

A. Two or three days.

Q. You stopped there as usual?

A. Yes, sir.

Q. Did you see the collateral note at that time?

A. I don't remember that I did.

Q. Had the notes got back from St. Louis then?

A. Oh, yes; the money had been paid.

48 Q. With whom did you have this conversation about the notes at Boston?

A. The cashier of the bank, if I had any conversation about it. They stated that the notes had arrived, and that they had paid one draft, and let another go back.

Q. Did they give you the exact figures of the one they had paid?

A. No, sir.

Q. State what was the large draft—the amount of the large draft.

A. I could not tell.

Q. As near as you can?

A. Thirty-two or thirty-three thousand dollars.

Q. It came inside the thirty-two thousand five hundred collateral note?

A. Yes.

Q. You said the small note was for a little balance of interest, about eighty dollars?

A. I supposed it was interest—about eighty dollars, I believe.

Q. Do you know by whom that draft was signed in St. Louis?

A. I understand it was signed—I have a letter from the bank stating it is signed by Mr. Britton, vice-president.

Q. Of the insurance company?

A. I don't know whether it was that; it came to the Atlas Bank from the Bank of the State of Missouri; it may be president of the insurance company or the bank, I cannot say. I think there is a man of that name connected with both those institutions.

Q. That draft was drawn on Mr. Honoré?

A. I understand so.

Q. And payable at the Atlas National Bank?

A. I don't know where it was payable.

Q. And pinned to it were these notes as collateral?

A. I don't know anything about that. I didn't think anything about it after that. I understood since the transaction that there was a draft made on Mr. Honoré, but I had nothing to do with that part of it, not the slightest. I don't know anything about it. I don't know anything about it now of my own knowledge.

Q. I would like to have you tell what you know, how that draft got there, from what you have learned from the Atlas Bank.

A. I don't know, only I have a letter written by the president of the bank or insurance company, stating that he drew and it states there, *July* on H. H. Honoré, for so much money. I don't remember the date; I never saw it until yesterday.

Q. Have you ever understood from the bank that the securities—these collateral notes, and the deed of trust, and so forth, accompanied the draft of Mr. Britton on Mr. Honoré?

A. Well, I suppose so; I don't know anything about that. I have never been told about that.

Q. You didn't see the notes at that interview—these collateral notes?

A. Not to my remembrance, I don't remember seeing them notes themselves, until they were sent out to me here, after the maturity of the second note—I think the second note.

Q. The bank told you they had them there?

A. They said they had seen them and paid for them.

Q. Did they tell you how they had done it—in what shape?

A. No.

Q. They didn't state whether it was a draft on Mr. Honoré?

A. No; they didn't state that at that time.

Q. Did they ever state to you afterwards—the bank authorities, I mean?

49 A. They have stated there was a draft drawn on Mr. Honoré, but the amount of it, and what channel it came through, and all that sort of thing, I never knew anything about, and don't now, what channel it came through in Boston.

Mr. WHITE. Q. Do you say the Atlas Bank authorities told you the draft was drawn on Mr. Honoré?

A. Yes, sir.

Mr. OTIS. Q. That is since the transaction?

A. Since the maturity—it never came up before.

Q. They didn't state whether the collateral accompanied it, or how?

A. Well, I don't think they would be likely to pay it if they didn't; they never went into particulars.

Q. Any further than they stated it was a draft sent?

They didn't say that at the time. I have understood that since; it was in that way that the money was obtained; it was a draft drawn on Mr. Honoré.

Q. Which the bank accepted?

A. Which the bank paid and got the deeds; that is as far as I know.

Q. You have learned this——

A. Since the maturity of the note.

Q. From the Atlas National Bank?

A. Yes, sir.

Q. This paper then, must have got into the hands of the Atlas National Bank in October, 1874?

A. That is my remembrance of it; at the same time I have got it a little mixed up by this letter being dated the 23d of July; I don't understand that. I am quite sure that was the month.

Q. You know, however, these notes, within a few days after you had your negotiation with Mr. Honoré, and received the collateral note of Mr. Bowen, that right along within a short time after that, the notes were sent out, and got into the hands of the Atlas National Bank?

A. Yes, sir; within a few days.

Mr. OTIS. I use the term collateral, as applied to the Bowen note, as merely descriptive of the character of the note; that it expresses that there are collateral by which it is secured.

Q. You understood that this note of Mr. Bowen's was the principal note, as we term it, and that these were the collaterals?

A. Yes, sir.

Q. When did you next have anything to do with these notes, or the note of Mr. Bowen?

A. When the first one became due.

Q. Where was that note of Mr. Bowen's payable, here, or in New York?

A. In New York.

Q. But how did you come to have anything to do with it, then?

A. Well, I think Mr. Honoré came in to have it renewed; came in with another note a few days before this one matured. I think that was the way it was, and I sent it down to the Atlas Bank and renewed it.

Q. The arrangements for the renewal, then, were made by you?

A. Yes, sir.

Q. Did Mr. Honoré bring in Mr. Bowen's note?

A. I think so.

Q. Was it for the——

A. The same identical amount.

Q. Thirty-two thousand five hundred dollars?

A. Yes, sir.

Q. Did he pay the discount?

A. Mr. Bowen paid the discount.

Q. Did he pay it to you?

A. Sent his check—yes; to me.

Q. It came to you?

A. I think that is the way it was.

Q. How was this account paid; by Mr. Bowen's check on the bank?

A. By Mr. Bowen's check on the bank.

Q. To your order or Mr. Honoré's order?

50 A. To my order, I think.

Q. What has become of that second note of Mr. Bowen's?

A. It is in our possession.

Q. In your possession?

A. Yes, sir.

Q. Will you annex it to your deposition?

A. It is in St. Louis or Chicago; it is with the papers.

Q. Will you annex the original or a copy to your deposition?

A. Yes, sir; if that is in order.

Q. With all marks and credits and everything to identify it?

A. Yes, sir.

Q. Did you give Mr. Honoré any receipts for these notes at either time?

A. Not at all.

Q. It was a matter of honor between you and him, that is, he handed you the notes, and you agreed to give him up the second note?

A. Yes, sir.

Q. You forwarded this second note to Boston?

A. Yes, sir.

Q. Do you know, or have you learned what they did with the first one, then?

A. They sent it back to me, I think, and I sent it over to Mr. Bowen?

Q. To Mr. Bowen or Mr. Honoré?

A. To Mr. Bowen.

Q. Was Mr. Bowen here at that time?

A. I think so, I don't remember about it; I could not say about that particularly, but if it was not, we probably put it in our wallet, and the first time we saw Mr. Bowen, give it up to him.

Q. Was that second note of Mr. Bowen in blank?
A. Exactly.
Q. No securities were designated in it at all?
A. None at all.
Q. Do you know whether in the first note of Mr. Bowen's, a description of the securities was inserted after it was given?
A. I know it was; yes, sir.
Q. Do you know whether this note will show for itself?
A. This note will show for itself.
Q. That must have been some time in January when that second transaction occurred?
A. February, I think, February.
Q. Had all these notes become due at that time?
A. All the principal notes.
Q. All of the collateral notes?
A. At the time the second note became due; yes, sir.
Q. At the time the first note became due, had all the collateral notes matured at that time?
A. It matured in December, the large note matured in December, 1874.
Q. So that when the renewal was given, all the collateral securities had become due?
A. I think this transaction was made earlier; I am a little out about the dates.
Q. I will ask you if the first note did not mature on the 14th of January, 1875?
A. I think it did; I don't know, I am sure. I cannot give the date without going to my books.
Q. At the time the first note had become due, all these mortgage notes had matured also?
A. I could not say about that.
Q. If they matured in December——
A. That is the way I recollect it; the last note matured in December; the notes will show for themselves; and the collateral note shows it. I now recollect, in thinking the matter over, the first dealings were in September or October.
Q. Had you, prior to the maturity of that first note, received any communication from Mr. Swope, or in his behalf about it, prior to the maturity of the first note given by Mr. Bowen?
A. Yes, sir; I had a letter from Mr. Swope, some man by that name,
51 I do not know whether it was this gentleman (Mr. Thomas Swope) or some other man, saying they would like to buy these notes, or if we had negotiated for them, they would like to buy them. We replied to them, I think, that we did hold those notes as collateral security.
Q. Did the Atlas Bank communicate with you when these notes became due?
A. No, sir; not when the principal note became due.
Q. When the second principal note came due, did the Atlas Bank communicate with you?
A. No; I wrote them that if it was not paid in New York to forward it to me for collection, and the Importers and Traders' National Bank did forward it to me.
Q. That is the first time you ever saw the notes and the trust deed?
A. Yes, sir.

Q. Were the opinions of title with it at that time, the abstracts, and so forth?

A. I think we had sent for them a few days before in order to give Mr. Honoré a chance to make other negotiations in St. Louis.

Q. Did you have an interview after these notes came to you with reference to the payment of this last note of Mr. Bowen's with Mr. Honoré?

A. I did.

Q. At what time?

A. Well, as soon as those notes became due—that note became due—it was sent to me for collection, and he immediately went to St. Louis. He had information that he could get money down there; that those notes could be carried down there, and he showed me letters and telegrams at different times stating that somebody would carry them, and he went there for that purpose, and I gave him the letter from Albert Todd, and the abstract, for the purpose of his using them in St. Louis, to find some one to carry these notes, the way the Atlas Bank had been doing.

Q. How long did you wait on him?

A. Waited until May, I guess; I think it was May or June.

Q. Did you apply to Mr. Bowen for the payment of this thirty-two thousand five hundred dollar note?

A. I did.

Q. Whereabouts?

A. I telegraphed him to New York.

Q. What was his reply?

A. His reply was that he would attend to it in a short time. I think the last telegram I had from him said he should know on Monday; the telegraph was to know why he didn't pay his note. He telegraphed to me he should know on Monday. That is the very last information I had from Mr. Bowen.

Q. You then caused these mortgage notes to be——

A. I waited until Monday—I waited until Tuesday—waited until Thursday, I think, and not hearing from Mr. Bowen, I authorized my clerk to have them advertized, to conform with the note, and sell them and have him buy them in for the Atlas National Bank.

Q. You know nothing about what took place with regard to the sale personally?

A. Not at all; I was away.

Q. Were you away when the sale took place?

A. Yes, sir.

Q. How much were they sold for?

A. I understood they sold for twenty thousand dollars.

Q. Did you understand so from the bank?

A. No, sir; I understood so from home here.

Q. What became of the thirty-two thousand five hundred dollar note; is it in your possession still?

A. Yes, sir; the possession of the Atlas Bank.

52 Q. Was any credit ever entered on that of any amount?

A. No; since it was sold there has been whatever this property was sold for, I suppose that is on, but what is on since I cannot say. I presume, however, the amount it was sold for was put on the back, not of my own knowledge though; I don't know of my own knowledge.

Q. Were the notes sent to St. Louis by you personally, or by your attorneys?

A. Yes, sir.
Q. You never had any interest in them individually?
A. Not the slightest.
Q. Prior to this original negotiation with Honoré, in 1874, you had had other like transactions with him?
A. Not like this exactly; small ones.
Q. Had you made loans to him?
A. I had bought some paper from him.
Q. Whose paper did you buy?
A. I could not remember now.
Q. Had he ever given you Mr. Bowen's notes, or sold you them?
A. I don't know whether he had; I think he had.
Q. About how many transactions had you had with him?
A. Three or four.
Q. Were they mortgage notes you had purchased?
A. Generally secured by real estate in some way; they all had security—every one.
Q. Had you ever before had Mr. Bowen's accommodation note?
A. Never.
Q. How did you get the impression that Mr. Honoré could get his note?
A. Well, I don't know; but I had. I had an eighteen hundred dollar note from him; I cannot say whether it was before or afterwards; but I had that impression.
Q. From something Mr. Honoré said?
A. From some way or another, that Mr. Bowen was in the habit of accommodating Mr. Honoré in that way. And I have had one other note of eighteen hundred dollars, but I cannot say whether it was before or after this transaction; it may have been before, and I may have got that impression in that way.
Q. This was paper you considered you were buying?
A. Yes; we was relying upon the property in St. Louis; nothing else.
Q. Notes secured by real estate?
A. Yes, sir; that is what we were going on.
Q. And the taking of the note of M. Bowen, with these as collateral, was a mere form?
A. Merely to accommodate the bank in Boston.
Q. State when the Atlas Bank was organized as a national bank.
A. I cannot say.
Q. Was it prior to this negotiation?
A. Oh, it has been a national bank ever since the act was passed, I think.
Q. Ever since 1864?
A. I think so; ever since I have known it.

Redirect examination of J. W. Doane.

Redirect examination by Mr. WHITE:

Q. Your attention was called to a letter written you by Mr. Swope will you please look at the paper now shown you, marked Exhibit F, and state if that is the letter referred to by you?
A. That is the letter.
Q. Had you any other or further understanding with Mr. Honoré that what you have already stated in reference to carrying these notes;

A. None other.
Q. Or with any one on behalf of Mr. Bowen or Mr. Honoré?
A. None other.

Q. You have then stated all that occurred, as near as you can
53 recollect, between you and Mr. Honoré in reference to this transaction?

A. I have.
Q. Or with any other person with reference to the transaction on behalf of Mr. Bowen or Mr. Honoré?
A. I have.

J. W. DOANE.

Subscribed and sworn to before me, on the day, at the place, and within the hours first aforesaid. Witness my hand and official seal.
[SEAL.] JOHN GRAY,
Notary Public.

JOHN W. DOANE in continuation of his deposition commenced yesterday, being recalled, on his oath further says:

Q. If you have examined your books and memoranda since your former examination in this matter on Saturday last, and desire to make any corrections to your former statement, or add anything to it, you may do so.

A. I have examined, since Saturday, my books, and find that the first note I took from Mr. Bowen was dated in July, near the twentieth, and that that note matured on October 3d, and a new note, taken then, running one hundred days, and then another of January 14th, running ninety days, which was the last note we had. I also wish to state that instead of being sure of receiving a check from Mr. Bowen for the discount, that I am not sure whether it was a check from him or from Mr. Honoré. By looking over my books to-day I cannot find that we did receive Mr. Bowen's check, still it was on my mind that we got our discount in that way.

Q. There appears to be your endorsement on the back of Exhibit D, as in evidence. State how that comes to be there.

A. The endorsement "Payable to the order of the Atlas National Bank" was made under instructions from the bank to endorse all the papers I sent, to prevent negotiation of this paper if it was lost in transit. The endorsement to me was made when sent to me for collection.

Q. Are you responsible to the bank for the endorsement you made to them?

A. No. I hold a letter from the bank, a resolution passed by the board, holding me harmless on any endorsement and all endorsements that I shall make.

2d cross-examination of J. W. Doane.

Cross-examination by Mr. OTIS:

Q. Mr. Doane, have you put in evidence the letter from the president of the insurance company, to which you referred on your first cross-examination?

A. No. White has got that.

Mr. OTIS. I call for that letter.

(Letter produced, marked Exhibit G, and attached to this deposition.)

Q. So your first conversation with Mr. Honoré, in reference to this loan, was in July instead of October?

A. Yes, sir.

Q. And the delivery of the note of Mr. Bowen to the president of the Atlas National Bank was also in July?

A. Also in July.

Q. And that draft of the insurance company on Mr. Honoré, which the Atlas National Bank paid, was also in July?

A. That is what I suppose. I never saw that draft, and don't
54 know anything about that matter. I have no doubt of it whatever.

Q. Have you any recollection of the circumstance connected with the delivery of the note dated October 3d, of 100 days?

A. Well, it is the same conversation that we had had before; it was just the renewal of the first note, and the same conversation took place at both renewals, as far as I can remember; it was a mere matter of negotiation.

Q. Who paid the discount at that time?

A. I cannot be positive who paid the discount.

Q. Was Mr. Bowen, at that time, in Chicago or New York?

A. I don't know.

Q. Have you a distinct recollection of the circumstances?

A. I have not. I can say what Mr. Bowen told me this morning.

Q. Then the first note, which was given on the twenty-third of July, was payable to the order of H. H. Honoré?

A. I don't remember; and I don't remember that that was the date of the note.

Q. If it was like the note given in October, it must have been payable to Mr. Honoré's order, wasn't it?

A. Precisely, if that was so. I know one of them was so.

Q. They are both payable to Mr. Honoré's order?

A. I presume the first one was in the same way; I don't remember.

Q. Endorsed by Mr. Honoré in blank, as this is?

A. I presume so; I don't remember. The books of the bank would show that.

Q. Who put on that blank stamp, "pay to the order"?

A. My clerk did.

Q. In whose handwriting is the description "These notes secured by trust deed"?

A. The first and second would be by the bank officer, that was done by my clerk.

Q. In whose handwriting is the body of the note dated January 14, 1875, marked Exhibit D?

A. Mr. Adams, my clerk.

Q. Did he write in it the description of the notes?

A. He did.

Q. Was that done before or after Mr. Bowen had signed it?

A. I cannot remember.

Q. Didn't Mr. Honoré bring Mr. Chauncey T. Bowen's name signed there in blank?

A. In the first two instances he did; I presume, however, that this was filled out for him to sign, and he signed it afterwards. I am not sure.

Q. Do you know?

A. I do not.

Q. Was the amount, in the first two instances, filled in that Mr. Bowen was to give his note for?

A. It was that, and the ordinary writing here was put in, but the space there was left bank.

Q. There was nothing left blank, then, except the description of the collaterals?

A. That is all.

Mr. OTIS. I call for a copy of the note given October 3d, 1874, marked Exhibit E.

Q. Mr. Doane, did you know that the property had ever been advertized for sale by the insurance company?

A. No, sir.

Q. Mr. Honoré said nothing to you about that fact?

A. No, sir.

Q. You never knew, then, that any attempt had ever been made to sell this property?

A. Not the slighest.

Q. And never have known it, except the attempt you made to sell it?

A. That is the only one I know of.

Q. And the only one you had heard of?

A. The only one I had heard of until Saturday. I heard some questions asked here then.

55 Q. I understand you the first note by Mr. Bowen was signed and given to your clerk, and brought by him to you at the Palmer House?

A. Yes, sir.

Q. In that the description of these collaterals was left blank?

A. Yes, sir.

Q. And in that condition precisely you handed it to the president of the Atlas National Bank?

A. Yes, sir.

Q. And when the note came due in October, Mr. Honoré handed you another note of Chauncey T. Bowen?

A. Yes, sir.

Q. In which the description of the notes was also left blank?

A. Yes, sir.

Q. That note you forwarded to the Atlas National Bank?

A. Yes, sir.

Q. Have you refreshed your recollection, and can you say whether the Atlas National Bank sent the first note back to you then?

A. I presume they did. I don't know. I expect they sent it back and I returned it to Mr. Bowen.

Q. Have you any positive recollection?

A. I have not, that would be the natural course of business; and I have no doubt that was the way pursued.

Q. So that you don't know whether that was filled in there or not when it came back?

A. No, sir.

Q. And don't know whether you ever saw it afterwards?

A. No, sir.

Q. Then, when the hundred-day note came due, you say that Mr. Bowen's note was brought in to you signed and filled out?

A. The last note was, I think, filled out in our office, having the collateral notes before us, and given to Mr. Bowen to sign afterwards.

Q. I thought you stated that you had never seen these collateral

notes until they were forwarded to you by the Importers' & Traders' National Bank, after they all come due?

A. No; when the hundred-day note came due they were sent here for collection to me, and have remained in my hands as agent for the Atlas Bank ever since.

Q. So that after the hundred-day note matured then you received a new renewal note here?

A. Yes, sir.

Q. Having the collaterals in your possession all the time?

A. Yes, sir; we had them before us, when we filled out that note; unless it had been sent on in the way the other two had been, in blank.

Q. You don't know whether that was given at the time it bears date or not?

A. It was dated at the time the others matured, but there may have been a day or two or a few days before I received that last note; I am not sure as to that.

Q. You didn't surrender the hundred-day note, at all?

A. I didn't surrender the hundred-day note at all; we should do so if anybody had applied to us for it. It was probably sent back to us from the bank, and we put it among our papers, and it never has been called for.

Q. Then your correspondence with Mr. Bowen was when the last note, dated January 14th, came due?

A. It was a few days later than maturity.

Q. Do you know who filled out the description of the collateral notes in the first two notes given by Mr. Bowen?

A. It looks like the cashier's handwriting in the hundred-day note. I never saw the first one. I presume it was Mr. Lane's, the cashier of the bank.

JOHN W. DOANE.

56 Subscribed and sworn to before me on the day, at the place, and within the hours first aforesaid.

Witness my hand and official seal.

[SEAL.]

JOHN GRAY,
Notary Public.

6th. Also all exhibits attached to the foregoing deposition marked respectively F and G, which are as follows:

Letter from T. H. Swope to J. W. Doane.—Exhibit F.

ST. LOUIS, MO., *Dec.* 15, 1874.

J. W. DOANE, Esq.:

DEAR SIR: I have been informed that you hold three promissory notes, made by L. O. Swope, payable to the order of R. C. Gordon—the last dated of them becoming due Dec. 26–29, 1874, the sum of the whole being about $32,000. If you will sell those notes, without recourse to you, I will buy them on the 26 of Dec., for the amount then due.

Please let me hear from you by return mail if convenient.

Respectfully,

THOMAS H. SWOPE.

P. S.—I refer you to Mess. Donnell, Lawson & Co., New York. Direct to care 515 Olive st., St. Louis, Mo. (Over.)

In case you do not hold these notes, will you be kind enough to let me know who does hold them, if you know, and refer my proposition to such party if convenient?

Letter from H. W. Block, cashier, to J. W. Doane & Co.—Exhibit G.

SECRETARY'S OFFICE, ST. LOUIS LIFE INSURANCE CO.,
St. Louis, July 12, 1875.

Messrs. J. W. DOANE & Co., 41 *Wabash ave., Chicago:*

GENT'M: By direction of Mr. A. M. Britton, our vice-pres't, I advise you that our draft July 3, 1874, $31,610.30 was drawn on H. H. Honoré.

Respectfully,

WM. H. BLOCK, *Cash'r.*

Deposition of C. T. Bowen.

7th. Deposition of Chauncey T. Bowen, which is as follows:

CHAUNCEY T. BOWEN, of lawful age, being produced, sworn, and examined on the part of the defendants, on oath deposes and says:

Q. What is your name, age, and place of residence?

A. Chauncey T. Bowen; age, forty-two; residence, Chicago.

Q. Do you know the parties in the title of these interrogatories named Logan A. Swope?

A. I don't know the plaintiff.

Q. Do you know Mr. Leffingwell?

A. Yes, sir.

Q. You know all the defendants, then, Mr. Honoré, Mr. Bowen, and Mr. Doane?

A. Yes, sir.

Q. Are you one of the defendants named?

A. Yes, sir.

Q. Do you know the property in question, being the property purchased by Mr. Honoré, and described in the petition as lot 24, in Lintel's second addition to the city of St. Louis?

A. Yes, sir; I have seen the lots; I didn't know it by the description; but I have had the lots shown to me as the lots purchased by Mr. Honoré.

Q. State what interest, if any, you have in the premises, or had in the premises at any time.

A. I held a security of $10,500, secured upon the premises.

Q. Have you any other or further interest in the property?

A. I have, by giving my note the Atlas Bank for $32,500 to secure those notes, that is the only interest. Being sold out of that
57 now, if that is the case, I haven't any.

Q. When did you make this loan of $10,500 on the property in question?

A. I think it was three years ago last May.

Q. What security, if any, did you receive from said Honoré for said loan?

A. I received Mr. Honoré's note, endorsed by Mr. McKindley, of St. Louis, and represented to me as the second mortgage on the property.

Q. How was the note secured?

A. Secured by a trust-deed.

Q. On this property?

A. On this property—a second trust-deed.

Q. Subject to what other incumbrance?

A. Subject to a previous incumbrance given by a Mr. Swope to some parties in St. Louis, represented to be thirty-two or thirty-three thousand dollars.

Q. Prior to Mr. Honoré's purchase of said premises, or subsequent thereto, had you ever had any arrangement or understanding with him whereby you was to become a party to said purchase, or part owner of said premises?

A. No, sir.

Q. You spoke of giving a note to the Atlas Bank, of Boston; when was that?

A. I could not give you the date, but I think it was late summer or early fall of 1874.

Q. For what amount was said note?

A. Thirty-two thousand five hundred dollars, if I remember right.

Q. State why and under what circumstances you gave said note.

A. I gave it at the suggestion and request of Mr. Honoré, that he could have the notes placed with some party that Mr. Doane was interested with. That paper that was then in question was not what they wanted, and they wanted a note to represent it. At first I declined to give it; to have anything more to do with it whatever; but afterwards I reconsidered it and gave my note, because I had the security above it. He said the notes would be foreclosed and sold out, and to save my own security I would have to step in and give this amount of money, and under those circumstances I gave the note.

Q. You then gave the note for $32,500?

A. Yes, sir.

Q. To whom did you give that note?

A. I gave the note—I handed it to Mr. Honoré.

Q. With what understanding and arrangement?

A. The understanding was, that some parties, whom Mr. Doane represented were to advance the money to buy this paper—to take up this paper from St. Louis and transfer it to some parties Mr. Doane represented. The note was filled out for $32,500, and dated, and left for the collateral to be written in. It was sent to New York or Boston, which, I don't know; first, I think to the Bank of Commerce, New York, and afterwards it was to go to Boston.

Q. What consideration, then, caused you to give this note?

A. The consideration that I held the second security above it, or next to it, upon the property for which I had advanced the money.

Q. You then gave this note to Mr. Honoré; when next did you hear of the note?

A. Some time in the winter. I cannot tell you the month now or the day. I signed another note for the same amount.

Q. At whose instance or request was that note signed?

A. Mr. Honoré's.

Q. What became of the first note that was given by you?

58 A. I may have it now in my possession, and it may have been destroyed.

Q. Have you made an examination for the note?

A. I have not. No, sir; it may be in Mr. Honoré's possession; I cannot tell now.

Q. Will you be kind enough to look for it?

A. If I have it in my possession I will produce it.

Q. After you gave this second note, then you obtained this first note, or it was given up?

A. What I want to say is, I guess the second note and the first note was to be returned to me, but it was not at that time, and whether it was returned to me afterwards and given to me, and I have it in my possession, or whether Mr. Honoré has it, or whether it was destroyed, I cannot say at the present time, but the understanding was, when I signed the second note, that it was to be used to provide the money to pay the first one.

Q. What understanding did you have as to what was to secure this second note?

A. The same note as the first one.

Q. You then have no positive recollection of seeing the first note subsequent to giving the second?

A. I could not state now. No, sir.

Q. When the second became due, did you take the same up?

A. No, sir.

Q. Did you have any negotiations with Mr. Doane relating to this matter?

A. No, sir.

Q. And when first applied to in the matter, you declined to give your note for the amount?

A. Yes, sir.

R. Do you remember to whose order the first note was given?

A. I do not. It may have been to my own order, and may have been to the order of H. H. Honoré.

Q. Did you have any understanding or arrangement whereby the proceeds of this note you were giving was to cancel or take up the other notes that were spoken of—the Swope notes?

A. My understanding was that they were to be taken up and held by the party receiving them, leaving the securities just as they were at the time upon the property; they were simply to be carried—extended along.

Q. The arrangement, then, so far as you understood it, was, not that the Swope notes were to be paid, but to be carried?

A. No, sir; they were not to be paid, but to be carried.

Q. Did you know at the time this arrangement was made that Mr. Swope had paid said notes, or any part of them?

A. No, sir.

Q. Did you ever advise Mr. Doane as to the value of the property prior to the taking of these notes?

A. No, sir; I might say that I did not know Mr. Doane, until this year in May, personally, to speak to him.

Q. Did you still hold the notes secured by the trust-deed given to you at the time you made the second note?

A. Yes, sir; hold it now.

Cross-examination of C. T. Bowen.

Cross-examination by Mr. OTIS:

Q. How many years have you lived in Chicago, Mr. Bowen?

A. Since 1849.

Q. How long have you known Mr. Henry H. Honoré?

A. Since 1852.

Q. How intimately?

A. Very intimately.

Q. Mr. Honoré has been a large operator in real estate?
A. Yes, sir.
Q. Here and elsewhere?
A. Yes, sir.
Q. You have had many business transactions with him?
59 A. Yes, sir.
Q. You are personal friends now?
A. Yes, sir.
Q. And have been for many years?
A. As far as I know.
Q. When did you see this property in St. Louis?
A. I think it was in February previous to the May——
Q. In reference to the fire—state how soon after the fire it was.
A. It was while there was a bill pending in the Missouri legislature of a park; I went to St. Louis, I think in February; I don't remember what year it was—it was either in 1872—I can tell by reference to dates—I can give you the exact date and the month I was there by reference. It was February, 1872.
Q. By refreshing your recollection, you fix the date?
A. Yes, sir; February, 1872.
Q. Who did you go with, Mr. Bowen?
A. I went down with Governor Ogelsby, of the State of Illinois, and Major Waite, of this city.
Q. Was Mr. Honoré down there?
A. No, sir.
Q. Was the property shown you at that time?
A. This property was shown to me at that time, not with any view of purchasing; it was only shown as other property was shown at the same time.
Q. By whom; who showed it to you?
A. By Mr. Gagy, of the firm of Leffingwell & Company, and by Mr. McKindley and Mr. Gagy both in May.
Q. The partner of the defendant Leffingwell?
A. Mr. Leffingwell, the firm of H. W. Leffingwell & Company, a real-estate firm in St. Louis.
Q. This Mr. McKindley is Andrew McKindley, a real-estate agent in St. Louis?
A. Yes, sir.
Q. Is this the only time you saw this property?
A. No, sir.
Q. Did you ever have any communication with Mr. Honoré about this identical property?
A. Yes, sir.
Q. When?
A. In May, 1872.
Q. Did you and Mr. Honoré visit St. Louis together on that occasion?
A. Yes, sir.
Q. How did Mr. Honoré come to go down there?
A. I don't know, sir; I think he was invited down there by Mr. McKindley; that is my impression now.
Q. How did you come to go down there, Mr. Bowen?
A. I went there in February, 1872; is that the time you refer to?
Q. The time you went with Mr. Honoré?
A. I had been with Mr. Lidway down to Springfield on some busi-

ness, and we both went down to St. Louis, and spent Saturday and Sunday there.

Q. Mr. Honoré was with you at that time?

A. Mr. Honoré was there.

Q. You saw him there in St. Louis, did you?

A. Yes, sir.

Q. Was that the time Mr. Honoré bought this property?

A. I don't know whether he bought it that time or later—the property was talked about.

Q. Did you have any conversation at that time with Mr. McKindley?

A. Yes, sir; I ta'ked with Mr. McKindley.

A. With reference to the purchase of the property?

A. No, sir.

Q. What time did Mr. Honoré take a deed of this property?

A. I could not tell you the date, but it was in the spring of 1872, I think.

Q. Was it at the time you were there, Mr. Bowen?

A. I do not think it was; I think it was later.

Q. Did he buy any property while you were there?

A. I don't think he did.

Q. Had you previously called his attention to this piece of property?

60 Q. What is the date of that mortgage of ten thousand five hundred dollars which you hold on this property?

A. The date of the note is May 23d.

Q. Where was it given?

A. The note was given to me by Andrew McKindley.

Q. Whereabouts?

A. In the city of Chicago.

Q. Did you bring it up here?

A. No, sir.

Q. When was the arrangement made by which you were to advance the money for which that note was given?

A. It may have been when I was in St. Louis, and it may have been by letter afterwards.

Q. Is the trust-deed dated the same time as the note?

A. I presume it is; I have no doubt to the contrary.

Q. Did you understand that that was the date at which Mr. Honoré had bought this property?

A. That is as I understood it.

Q. You so understood it at the time?

A. Yes, sir.

Q. You understood that that was the date at which Mr. Honoré had bought this property?

A. Yes, sir.

Q. Who represented to you that that was a second mortgage?

A. Mr. McKindley.

Q. Did you know the details of the trade by which Mr. Honoré bought it?

A. Only as it was reported to me; I knew nothing of my own knowledge.

Q. Who reported it to you?

A. Mr. McKindley and Mr. Honoré, both.

Q. How did they report it—what did Mr. Honoré say?

A. Mr. Honoré said this property—my memory is the property was eighty thousand dollars; that the first mortgage was thirty-two or three

thousand dollars—that my mortgage was the second one. Then there were two mortgages of eighteen thousand dollars given above mine, one of which was to go to Mr. Swope, and the other to Mr. McKindley.

Q. Is that the representation that Mr. McKindley made to you at that time?

A. Yes, sir.

What induced you to advance ten thousand five hundred dollars on a second mortgage in St. Louis?

A. Well, it would take some time to answer that question.

Q. Go on and answer it at length.

A. I have known Mr. Honore for a good while, and have done this thing for him in Chicago at various times, in years past; advanced him money to make first payments, and taken his securities upon it; and also loaned him my note for such purposes. It has been the custom for me to do that for him for several years previous to this, before the fire, and after; it had always turned out successful, and I looked upon this as a second mortgage upon this property when there were two above it of eighteen thousand dollars—thirty-six thousand dollars above it; that I didn't run any risk; that it was a safe transaction to me.

Q. Suppose there had been a large advance in price of that property, and it had been sold for a good deal more than Mr. Honore gave, were you to share in that profit in any way?

A. No interest whatever.

Q. Have you and Mr. Honore had dealings when you had advanced money to him to make the first payments where you have received a share of the profits when the property was sold?

A. I have in some instances; in some instances I have not.

Q. Wasn't that generally the case, when you advanced money for Mr. Honoré?

61 A. No, sir; the other is the majority.

Q. But you have advanced money to him and taken second mortgages?

A. Yes, sir.

Q. As a business-man, handling large amounts of money, don't you regard a second-mortgage security in a distant city as very unsatisfactory and insufficient?

A. Sometimes I would, and sometimes I would not. It depends upon the property. Second mortgages I do not look upon a' government bonds.

Q. You were in St. Louis this second time in May, 1872?

A. Yes, sir; it was in the spring of 1872—in the warm weather.

Q. It must have been at the time in which this purchase was made in the name of Mr. Honoré, wasn't it?

A. About that time—I cannot say—it might have been twenty days sooner.

Q. It was about that time?

A. Yes, sir.

Q. Was anything said by Mr. Honore to you, at that time, that he would want to get the money to make the first payment of you?

A. I think he did. Yes, sir.

Q. What did he say about it, Mr. Bowen?

A. I don't remember now. I think he said if he could arrange with me to arrange this ten thousand dollars, he would buy that property.

Q. Did you and he talk about the prospects of that property—the future prospects?

A. I don't know that we did. No, sir.

Q. Did you express any opinion as to whether it was a good purchase or not?

A. I think I told him I thought it was a very full price. Some property I was interested in just south of it had been bought for a great deal less money.

Q. Didn't Mr. McKindley have an interview with you also when you were in St. Louis in May?

A. I think Mr. McKindley took a carriage, and drove up, showing where the park was to be, and drove about St. Louis. I think I spent one afternoon with him.

Q. That was at the time this purchase was made by Mr. Honoré?

A. I don't know but it was immediately this time; it was at the time he showed the property.

Q. That was the second time you had seen it, then?

A. Yes, sir; the first time I had seen it I had seen it with all the other property; there was other property shown me in St. Louis at that time.

Q. With whom were you interested in other property in St. Louis?

A. With Sheridan Waite and Governor Oglesby.

Q. Did you and he make the purchase about the same time?

A. No; we made it in February.

Q. You had made it in the February previous?

A. Yes; then we made some afterwards—still later.

Q. Had you ever spoken to Mr. Honoré, or Mr. Honoré to you, about the purchase of property in St. Louis prior to the time you met there in May, 1872?

A. It is possible I may have referred to St. Louis with him, but I don't know that I did; I have no recollection of it now.

Q. Mr. Honoré has been speculating for years, hasn't he?

A. I believe he has; that is his reputation.

Q. Was speculating largely at that time in real estate, wasn't he?

A. Yes, sir.

Q. Were you pretty familiar with his affairs at that time, Mr. Bowen?

A. No, sir.

Q. What was his credit at that time?

62 A. Well, I think his credit, after the fire, was very fair.

Q. He was owing a good deal of money?

A. He borrowed more money in town than any man I know of.

Q. He owed a great deal of money?

A. Yes, sir.

Q. Everybody knew that?

A. Yes, sir; that was known everywhere.

Q. Did you understand from Mr. Honoré and from Andrew McKindley that your mortgage of ten thousand five hundred dollars was to come in ahead of the mortgage that was to be given to Mr. Swope for the purchase-money?

A. Yes, sir; it was so represented to me by them both.

Q. Whereabouts?

A. In Chicago.

Q. In St. Louis also?

A. No, sir.

Q. Where did you have that interview with Mr. McKindley?

A. In this city.

Q. In what particular place?

A. I could not tell you now, sir, whether it was in my office; I presume it was in my office.

Q. It was at the only interview you had with Mr. McKindley after this purchase, was it not?

A. Yes, sir; I have no recollection of ever seeing him after until this summer again; I don't remember that I did.

Q. It was at the interview you had with him, and the only interview you had with him, about the time this purchase was made?

A. The interview I had with him was at the time he came to Chicago with this paper, and brought the abstract of title, or certificate of abstract of title from Mr. Todd, January, this year.

Q. Wasn't there anything said—any assurance given, or any understanding between you and Mr. Honoré, that if they made anything out of that property he was to share with you?

A. Not any whatever, sir. Mr. Honoré, Mr. Sidway, and I bought another block in St. Louis, in which the deeds passed, and we had a joint interest of one-third in it.

Q. Were the deeds taken in your name or his?

A. In his name, and then deeded to me, and ⅓ then to Mr. Sidway.

Q. Have you had frequent transactions with him, where your interest in property rested in his word alone?

A. No, sir.

Q. Hasn't he bought property where it was the agreement he should give you a share of the profits in it?

A. I don't think I have any now.

Q. Then you say you haven't any agreement with Mr. Honoré, nor no understanding that you should share in the profits of this property?

A. No understanding or no expectation of any share in it.

Q. The money was advanced here in Chicago?

A. Yes, sir; I paid the money here.

Q. That was paid in pursuance of the arrangement you made in St. Louis while you were there?

A. I don't remember that the arrangement was perfected in St. Louis; I was there but a short time, Saturday and Sunday, and I don't know that the property was purchased then; I cannot say when Mr. Honoré agreed to take the property, but after that Mr. McKindley came here, and I did advance this money; I cannot say just when the conversation occurred as to the arrangement to be made, but the final arrangement was made in Chicago, and at which time I gave him the money on this note, and I cannot tell you just where I gave him the check, but
63 I presume in my own office; I took up the note, and I presume I can produce the check which I gave Mr. McKindley; at that time I gave the money to Mr. McKindley he came here with the papers.

Q. And that was the time that he told you that yours was to have precedence over the mortgage to Mr. Swope for the purchase-money?

A. Yes, sir. The representation was to me, that sum of money above this was profitable; that he and Mr. Swope owned the property together, or he with somebody else, and that this money was to go to another Mr. Swope, not the man he was interested with—this ten thousand dollars—and the balance of it was to be divided between them two. That was to be the second security above this.

Q. Your mortgage for ten thousand five hundred dollars was to have precedence—was to be ahead of the purchase-money?

A. It was the purchase-money.

Q. But was to be ahead of the notes given for the purchase-money?

A. No; there was an assumption of security at here, of thirty two or three thousand dollars.

Q. That was to be first?

A. Yes; then mine was to be next.

Q. Ahead of the notes Mr. Honoré gave to Mr. Swope?

A. Yes; then the other two notes of Mr. Honoré's, which were to be divided, as I understood at that time, between Mr. McKindley and Mr. Swope were to be next on the property.

Q. When did you learn that the mortgage for ten thousand five hundred dollars was not a second mortgage?

A. This year, since my memory is now. If I should refer to my memory, Mr. Honoré remained in St. Louis, and I came home on Sunday night, and whether he closed it when there, or closed it afterwards by correspondence, I am unable to tell you.

Q. Did you have any correspondence with Mr. McKindley?

A. No, sir; I don't remember that I did.

Q. Did you ever have any correspondence with Mr. Honoré about it?

A. I don't think I did, sir.

Q. Don't you know it was represented by Mr. Andrew McKindley that you were interested in the purchase of that property, with Mr. Honoré?

A. I cannot say; I don't know what he represented.

Q. Did you ever hear or know anything more about this purchase by Mr. Honoré of Mr. Swope after you were in St. Louis and bought your first mortgage, until you gave the note of thirty-two thousand five hundred dollars; between those dates had you anything to do, or known anything about the property?

A. I don't know that I did.

Q. Do you know this gentleman, Mr. Thomas Swope?

A. I have seen this gentleman; yes, sir.

Q. Did you have an interview with him in 1873 in Chicago?

A. I think I met him in Chicago; yes, sir?

Q. It was the only time you saw him in Chicago prior to this summer?

A. Mr. Swope—I cannot tell you the year he was in Chicago, and I think I drove him—I met him and Mr. McKindley; that is my memory about it now.

Q. Wasn't an application made to you at that time by somebody to make a payment on account of these notes at St. Louis?

A. No, sir; not that I remember of.

Q. The time you refer to was shortly after the purchase was
64 made, was it not, Mr. Bowen, when you drove Mr. Swope around the city?

A. I think that was in the spring; I think so.

Q. And at the time the money was paid?

A. I think so.

Q. Didn't you see Mr. Swope afterwards in July, 1873?

A. It is possible Mr. Swope was in Chicago at another date.

Q. I will ask you if any representations, or anything was said to you by either Mr. Swope or Mr. Honoré about the property's having been advertised for sale on this first mortgage at this time, in July, 1873?

A. I have no recollection of knowing that the property was advertised.

Q. Didn't Mr. Honoré or Mr. Swope tell you that he understood, or had heard, that the property had been advertized for sale on these notes—the first mortgage?

A. No, sir; I don't remember that.

Q. Mr. Bowen, didn't you give a check to Mr. Honoré for something

in the neighbourhood of two thousand dollars, in July, 1873, to be applied mortgage?

A. I presume I gave him a check, but I don't know where it was to be applied.

Q. Have you any recollection of giving that check?

A. I gave him a great many checks, and I cannot tell now.

Q. Did he ever apply to you for money to be paid on that first mortgage?

A. I don't recollect now that he did.

Q. Didn't he come to see you on or about the eighth day of July, 1873, at a time when Mr. Thomas Swope was present, and didn't you give Mr. Honoré your check for two thousand dollars to make a payment on account of this first mortgage? Have you any recollection of the transaction?

A. I have no recollection of any payment on any mortgage of this kind. I may have given him a check, and presume I did. I can tell by reference whether I did or not.

Q. Was nothing ever said at that time about what he wanted the check for?

A. Not that I remember of.

Q. Will you be good enough to look over your memorandum during the summer of 1873, and see if you can identify that particular check which was given to Mr. Honoré?

A. I will; yes, sir.

Q. Do you remember the interview between yourself and Mr. Honoré and Mr. Swope in Mr. Honoré's office, in July, 1873, and the giving of a check on your part to Mr. Honoré, in his presence, which was passed over to Mr. Swope for about two thousand dollars?

A. No, sir; I do not.

Q. When was this mortgage for ten thousand five hundred dollars to become due, Mr. Bowen?

A. One year.

Q. What steps did you take towards enforcing its collection at the time it came due?

A. None whatever.

Q. What became of it?

A. I have it now.

Did you ever send it to St. Louis to be paid?

A. No, sir.

Q. Kept it in your safe?

A. Yes, sir.

Q. Was it payable in the bank there?

A. I think it was payable here. It may have been payable there; I don't remember which.

Q. But it was not put into any bank for collection?

A. No, sir.

Q. Did you and Mr. Honoré have any conversation after this purchase was made in May, 1872, about this piece of property here, and with reference to these first mortgages on it?

65 A. I cannot say now; I presume we did have. I don't remember any particular conversation.

Q. When did he apply to you for his thirty-two thousand five hundred dollar note?

A. I stated previously it was in the late summer or early fall of 1874.

Q. Whereabouts was it, Mr. Bowen?

A. Yes; then mine was to be next.

Q. Ahead of the notes Mr. Honoré gave to Mr. Swope?

A. Yes; then the other two notes of Mr. Honoré's, which were to be divided, as I understood at that time, between Mr. McKindley and Mr. Swope were to be next on the property.

Q. When did you learn that the mortgage for ten thousand five hundred dollars was not a second mortgage?

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Q. Did you have any correspondence with Mr. McKindley?

A. No, sir; I don't remember that I did.

Q. Did you ever have any correspondence with Mr. Honoré about it?

A. I don't think I did, sir.

Q. Don't you know it was represented by Mr. Andrew McKindley that you were interested in the purchase of that property, with Mr. Honoré?

A. I cannot say; I don't know what he represented.

Q. Did you ever hear or know anything more about this purchase by Mr. Honoré of Mr. Swope after you were in St. Louis and bought your first mortgage, until you gave the note of thirty-two thousand five hundred dollars; between those dates had you anything to do, or known anything about the property?

A. I don't know that I did.

Q. Do you know this gentleman, Mr. Thomas Swope?

A. I have seen this gentleman; yes, sir.

Q. Did you have an interview with him in 1873 in Chicago?

A. I think I met him in Chicago; yes, sir?

Q. It was the only time you saw him in Chicago prior to this summer?

A. Mr. Swope—I cannot tell you the year he was in Chicago, and I think I drove him—I met him and Mr. McKindley; that is my memory about it now.

Q. Wasn't an application made to you at that time by somebody to make a payment on account of these notes at St. Louis?

A. No, sir; not that I remember of.

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A. I think that was in the spring; I think so.

Q. And at the time the money was paid?

A. I think so.

Q. Didn't you see Mr. Swope afterwards in July, 1873?

A. It is possible Mr. Swope was in Chicago at another date.

Q. I will ask you if any representations, or anything was said to you by either Mr. Swope or Mr. Honoré about the property's having been advertised for sale on this first mortgage at this time, in July, 1873?

A. I have no recollection of knowing that the property was advertised.

Q. Didn't Mr. Honoré or Mr. Swope tell you that he understood, or had heard, that the property had been advertized for sale on these notes—the first mortgage?

A. No, sir; I don't remember that.

Q. Mr. Bowen, didn't you give a check to Mr. Honoré for something

in the neighbourhood of two thousand dollars, in July, 1873, to be applied mortgage?

A. I presume I gave him a check, but I don't know where it was to be applied.

Q. Have you any recollection of giving that check?

A. I gave him a great many checks, and I cannot tell now.

Q. Did he ever apply to you for money to be paid on that first mortgage?

A. I don't recollect now that he did.

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A. I have no recollection of any payment on any mortgage of this kind. I may have given him a check, and presume I did. I can tell by reference whether I did or not.

Q. Was nothing ever said at that time about what he wanted the check for?

A. Not that I remember of.

Q. Will you be good enough to look over your memorandum during the summer of 1873, and see if you can identify that particular check which was given to Mr. Honoré?

A. I will; yes, sir.

Q. Do you remember the interview between yourself and Mr. Honoré and Mr. Swope in Mr. Honoré's office, in July, 1873, and the giving of a check on your part to Mr. Honoré, in his presence, which was passed over to Mr. Swope for about two thousand dollars?

A. No, sir; I do not.

Q. When was this mortgage for ten thousand five hundred dollars to become due, Mr. Bowen?

A. One year.

Q. What steps did you take towards enforcing its collection at the time it came due?

A. None whatever.

Q. What became of it?

A. I have it now.

Did you ever send it to St. Louis to be paid?

A. No, sir.

Q. Kept it in your safe?

A. Yes, sir.

Q. Was it payable in the bank there?

A. I think it was payable here. It may have been payable there; I don't remember which.

Q. But it was not put into any bank for collection?

A. No, sir.

Q. Did you and Mr. Honoré have any conversation after this purchase was made in May, 1872, about this piece of property here, and with reference to these first mortgages on it?

65 A. I cannot say now; I presume we did have. I don't remember any particular conversation.

Q. When did he apply to you for his thirty-two thousand five hundred dollar note?

A. I stated previously it was in the late summer or early fall of 1874.

Q. Whereabouts was it, Mr. Bowen?

A. Here in Chicago.

Q. At your office or his?

A. I could not tell you that.

Q. What conversation took place between you at that time?

A. I think I stated before just the conversation?

Q. Will you repeat it, please?

A. That he had arranged or proposed some arrangement with Mr. Doane, through parties that he represented, to have money advanced to the parties in St. Louis. And I understood, at least, my recollection is, that he had already ordered the notes sent to the Bank of Commerce in New York, to be taken up, and that Mr. Doane would not complete the arrangement without my note. At first I declined to give it—said I would not give the note that I had had trouble enough; that this payment he owed me was unpaid, and I declined to give it; and I think two or three days later I rescinded my declination, and signed the note, after examining the matter, and finding that these notes might be foreclosed, and and that I would have to step in to save my own money, to furnish the money. I thought I might as well become liable for it in this way as in any other way.

Q. Did Mr. Honoré tell you that a portion of these notes were due?

A. I don't know but he did, but I think I knew of my own knowledge that the first and second one was due, or the first was due at least—past due.

Q. Had you ever made loans through Mr. Doane, or the Atlas National Bank?

A. No, sir.

Q. Had you ever had any business transactions with that Bank before?

A. No, sir.

Q. Your note was regarded as an accommodation note for Mr. Honoré; was it, this $32,500?

A. I don't know how Mr. Honoré regarded it.

Q. How did you regard it?

A. I regarded it as a note for $32,500.

Q. Given for the accommodation of Mr. Honoré?

A. No, sir; when I sign my name to a note, I consider it as a note.

Q. But it was given for Mr. Honoré's benefit?

A. It was given to secure or to take care of those notes and have them extended, and this was not a satisfactory shape to have it in; and my note was put in the place of it, so if any failure occurred, or anything of that kind, I was liable for it.

Q. You expected the St. Louis notes taken care of with the proceeds of yours?

A. Yes, sir.

Q. You were in good credit at that time, were you not?

A. I won't say.

Q. Your notes were discounted readily at that time, were they not?

A. I don't know how people regarded me.

Q. But you had no trouble in getting any bank accommodations you wanted?

A. No, sir.

Q. If you had desired your note for $32,500, your note would have commanded that amount in money, would it not?

A. Perhaps not for so large an amount in one bank.

Q. It was the proceeds of this note for $32,500 that you ex-
66 pected to apply towards the St. Louis notes—the prior notes?

A. My understanding was, and expectation was, that these notes were to be taken by these parties and carried, and for the benefit of the bank that took this loan; they wanted the paper. It represented short dates. At any rate, I think by law, they could not take really what would be called real-estate paper; and this was put in that shape to represent that, and the loan could not be made, or the transaction could not be made without my note; and that is why I gave it. That was the representation to me.

Q. Mr. Honoré made that representation to you?

A. Yes, sir.

Q. Where were you at that time, Mr. Bowen, in Chicago?

A. Yes, sir.

Q. How long was that note to run, M. Bowen?

A. My memory is, it was four months.

Q. Did you authorize any one to write in that a description of the other notes to be held as collateral?

A. Yes, sir.

Q. What did you say to Mr. Honoré by which that authority was conveyed or given?

A. I had no description of the notes that were to be used; and that place was left blank, authorizing taking it, to put that in.

Q. Did you authorize him to do it?

A. Yes. sir.

Q. By what words or language?

A. I can't say just the words I used, but I gave him consent that it should be done.

Q. Where were you when that note came due?

A. I think I was in New York.

Q. Did you make the second note in New York?

A. No, sir; I made it in Chicago.

Q. The one given in renewal of the first one?

A. Yes, sir.

Q. Whereabouts—at your office here?

A. Possibly; or at the Pacific Hotel.

Q. Did you deliver it personally to Mr. Honoré?

A. Yes, sir.

Q. And had Mr. Honoré applied to you for a renewal of that note at that time?

A. Mr. Honoré brought me a new note to sign, saying that he had arranged to have this used in the place of the other.

Q. Was any description of the notes in that, filled up?

A. I could not tell you now whether it was or was not.

Q. You signed the note and handed it back to Mr. Honoré?

A. Yes, sir.

Q To whose order were those notes made payable, Mr. Bowen?

A. I stated originally, either to my own order or to Mr. Honoré's order, I don't remember which.

Q. Do you know whether Mr. Honoré's name didn't appear on them, either as endorser, or otherwise?

A. It may be so. I stated from memory it was either to my own order or to Mr. Honoré's order; the notes would show for themselves.

Q. Did you understand that this note that was given to the Atlas National was to represent anything except the St. Louis notes—these first mortgage St. Louis notes on this property?

A. No, sir.

Q. No other matters were included in that negotiation?

A. No, sir.

Q. When and by whom was this first note surrendered to you?

A. I may have received it and I may not. I have no recollection now of receiving that. I went to New York shortly after; it may have been left with Mr. Chase and be among my papers; and I never have seen it.

67 Q. Did you take any receipt from Mr. Honoré for either of these notes?

A. No, sir.

Q. No memorandum in writing showing where they were to be applied?

A. No, sir.

Q. You don't know that the first note was ever surrendered to you at all?

A. I could not say that it was.

Q. You will not swear you have ever seen it from the time it was given?

A. No, sir.

Q. Have you ever seen the second note since you gave it, Mr. Bowen?

A. Yes, sir; I have.

Q. Whereabouts, and when?

A. In this office.

Q. When?

A. Yesterday.

Q. With reference to your being a witness here?

A. I came here yesterday to meet Mr. Doane, as to the time I was expected to be called as a witness, and Mr. White. I wanted to go out of the town.

Q. If you saw it yesterday, cannot you state about it, to whose order it was payable?

A. No, sir.

Q. Do you remember the precise amount?

A. Thirty-two thousand five hundred dollars, is my memory?

Q. Who paid the discount on that first note, Mr. Bowen?

A. I cannot tell you now.

Q. Didn't you give Mr. Honoré a check to pay the discount on that first note when it was renewed and the second one given?

A. I don't think I did. No, sir.

Q. Have you any memorandum to show whether you did or not?

A. I can tell; yes.

Q. Will you examine your books, and state whether you did or did not; and, if so, the amount of the check?

A. Yes, sir.

Q. Where were you when this last note matured?

A. I was in New York.

Q. What negotiation did you have with reference to this payment, and with whom?

A. The first intimation that I had that the note was not paid was a telegram from Mr. Doane stating to me that the note was not taken up.

Q. By whom did you expect it to be taken up, Mr. Bowen?

A. Mr. Honoré had some arrangement made in St. Louis by which he expected to have transferred the security there and get the money, and I believe did make arrangement, and the arrangement for some reason was not carried out. I received a telegram from Mr. Doane that the note was not paid. I answered that telegram by stating I would be

in Chicago and would attend to it in a few days—and would give attention to it.

Q. Did that end the correspondence on the subject?

A. No, sir.

Q. What other correspondence was there?

A. I later had a partial arrangement, and did expect to have negotiations with a gentleman to take this security and carry it, and while the negotiation was pending I was taken sick, and haven't been to New York since.

Q. Do you know anything about the sale of the notes under the power?

A. Not of my own knowledge.

Q. What did Mr. Honoré say about these negotiations in St. Louis?

A. Mr. Honoré wrote me, I think, that he had made the arrangements in St. Louis to have the notes taken up.

Q. When you gave the note was Mr. Honoré to provide for its payment; was that the understanding when you gave it?

A. I don't think there was any positive understanding.

Q, When this first note was to mature, who was to pay it, Mr. Bowen?

68 A. Well, I expected if the note was not renewed that I should have to pay it myself or provide for its payment.

Q. Did you expect Mr. Honoré was to assist you in that transaction or would make other negotiations?

A. He usually had done that—provided for it; otherwise, in the last resort I expected I was holden for it.

Q. Of course you were expected to pay it, but wasn't it the understanding between you and Mr. Honoré that Mr. Honoré was to furnish the proceeds to pay that note?

A. I don't think there was any understanding that Mr. Honoré was to furnish it, but that he would negotiate with some one else, and provide for its being renewed and carried by some other parties.

Q. The understanding was, as between you and Mr. Honoré, that you were not to be liable on that note, but that he was to find somebody else to carry the property when the arrangement with Mr. Doane ended. Was that the understanding?

A. I don't know that we ever had any conversation to that extent. I don't remember that we did. I can only state what my own understanding was or my own feeling was at the time.

Q. Just state what the understanding was as to how or by whom this note should be paid to the Atlas National Bank?

A. When this note was given at four months—the original note was given for four months—to the Atlas National Bank, I did expect that unless I arranged with some one else, or Mr. Honoré arranged with some one else to transfer the security and carry it, that I should have to pay it. I didn't expect anything else. I always had paid my paper up to that time, and expected to pay it.

Q. You expected Mr. Honoré to find some one else to carry it?

A. Yes, sir.

Q. As between you and Mr. Honoré that note was for Mr. Honoré to pay, wasn't it?

A. I had no interest in the note whatever beyond what I have stated now.

Q. But as between you and Mr. Honoré you felt that Mr. Honoré was under obligations to you to see that note paid didn't you?

A. Yes, sir.

Q. That it was given for his accommodation?

A. I don't consider it as given entirely for his accommodation. It was given to secure the property, so that my *second* mortgage would not be sold out under the *second* mortgage.

Q. I will ask you to fix the time, Mr. Bowen, when this second note was given to the Atlas National Bank, or to Mr. Honoré to be given to the Atlas National Bank.

A. I was in Chicago from the 5th to the 10th day of January.

Q. 1875?

A. Yes, sir.

Q. It must have been given between those dates?

A. Yes, sir.

Q. Then it was given after all these purchase-money notes of the first mortgage had come due?

A. I could not say as to that. I don't know when they came due.

Q. An inspection of the notes will show you the last one matured in December, 1874?

A. I have never seen those notes, and don't know when they matured.

Q. Did you see an abstract of the property representing what notes were secured by first mortgage when you advanced the $10,500?

69 A. I saw a letter from Mr. Todd stating that the title had been examined by him and the security upon it at the time.

Q. You haven't that second note in your possession Mr. Bowen—the second note you gave for $32,500?

A. No, sir; I have not.

Q. When was that to mature, Mr. Bowen?

A. My memory is it was four months.

Q. You don't remember, between the 5th and 10th of January, that you gave Mr. Honoré a check to pay the discount on that first one?

A. No, sir.

Q. You think this original transaction which resulted in the first $32,500 note, was in Chicago; it was before you went to New York?

A. My signing the first note?

Q. Yes.

A. I signed the note for $32,500 in Chicago; yes, sir.

Q. Both of them?

A. Both of them in Chicago.

Q. Mr. Honoré said at the time the first note was given that the reason he wanted it was that the Atlas National Bank was a national bank and could not buy real-estate paper. I understood you to say that?

A. I stated before, that the parties Mr. Doane represented; I don't remember just whether it was to go to the Bank of Commerce or the Atlas National Bank. My memory is that this paper first had been sent to the Bank of Commerce in New York, and some arrangement had been made at the east, through Mr. Doane; I don't know with whom. But that the reason my note was wanted was that the bank didn't want past-due real-estate paper, but wanted a note at short date.

Q. Because it was a national bank?

A. He may have stated that.

Q. You know it was a fact that the Atlas Bank was a national bank at that time, was it not?

A. I don't know, I am sure. I have never seen the name; whether it is Atlas National Bank, or Atlas Bank. I may have heard of it a

dozen times, but my memory not being fixed upon it; I never had any business transaction with it, and very little business in Boston any way, so I cannot tell.

Q. Have you any interest in these first-mortgage notes now, Mr. Bowen?

A. Not if I am rightly informed that a sale was made.

Q. Did you know anything about the property having been advertized to be sold, under that first mortgage?

No, sir.

Did you ever know it had been advertized to be sold in 1873—in the summer of 1873, when you saw Mr. Swope here in Chicago?

A. I don't recollect now that I did. It may have been so, but I don't recollect it.

Q. Did you know that it had been advertized to be sold this past summer in July, 1875?

A. I have been told it has been advertised in the last thirty days to have been sold.

Q. You didn't know it at the time?

A. No, sir.

Q. And if I understand you, the $32,500 has not been paid—any part of it—by you?

A. No, sir. I will state that I was at Crescent for seven weeks; and for four weeks didn't receive any letters or papers or telegrams from anybody; and what happened while I was there—I don't know what did happen.

Q. Do you know whether on that second note there had been any credits endorsed?

A. None that I know of.

Q. The one you saw yesterday; any endorsements or credits on it?

A. I don't know, I didn't see them.

70 After reading over the deposition witness desires to change the first answer on page 104, to read as follows: "I did hear of the property several times."

CHAUNCEY T. BOWEN.

Subscribed and sworn to before me, on the day, at the place, and within the hours first aforesaid. Witness my hand and official seal.

[SEAL.] JOHN GRAY,
Notary Public.

8th. Deposition of A. M. Britton, which is as follows:

Deposition of A. M. Britton.

ALFRED M. BRITTON, of lawful age, being produced, sworn, and examined on the part of the defendants, by J. C. ORRICK, esq., their attorney, deposeth and saith:

Q. 1. State your name, age, residence, and occupation.

A. 1. Alfred M. Britton; age, 33; am vice-president St. Louis Life Insurance Co.; reside in St. Louis, Missouri.

Q. 2. How long have you been vice-president of the St. Louis Life Insurance Co.?

A. 2. About twenty months.

Q. 3. In your office as vice-president of the company what duties have you charge of?

A. 3. I supervise the business of the general office and attend especially to the investment of its funds. [Witness is here shown three

notes (and a deed of trust securing same), dated September 26th, 1871, payable respectively in one, two, and three years after date, in favor of Robert C. Gordon; the first for $12,586.65; second for $11,946.65; and the third for $11,306.65, each endorsed by R. C. Gordon, and Eliza Gordon, and "without recourse in law or equity," Wm. J. Lewis, pres't. On the first which notes there is a credit of $3,936.)

Q. 4. Witness is asked to examine these notes and deed of trust and to state if he has ever before seen them, and if he has any knowledge of them.

A. 4. I have seen them before and recognize them to have once been the property of the St. Louis Life Insurance Company.

Q. 5. Are they the property of the St. Louis Life Insurance Company now?

A. 5. They are not.

Q. 6. State, if you know, what disposition was made of these notes by the St. Louis Life Insurance Company, and all the facts, as far as you remember, in reference to this.

A. 6. In June, 1874, I made a demand on Mr. H. H. Honoré, of Chicago, who had previously informed me that he had assumed the payment of these notes, for the money on them, they all having been past due—Mr. Honoré wrote me that it was impossible for him to make a new loan on this property because there was a second mortgage on it, and that he had been endeavoring to find a party who would purchase these notes, and that if we would endorse the notes without recourse, he could find such party. He afterwards wrote me that a Mr. Doane would purchase the notes and we should send them to New York and he would give us the money on them. I drew a draft for amount of the principal and interest, attached notes to same and forwarded
71 them for collection to New York, through the National Bank of the State of Missouri. The draft went to protest and was returned to St. Louis together with the notes. Mr. Honoré then wrote me that Mr. Doane had been unable to find the notes in New York, which accounted for their not having been paid, and that if I would send them to the Atlas National Bank (I believe that is the name) of Boston, that they would be taken up. I forwarded them to Boston, through the National Bank of the State of Missouri, where they were paid, that is, the draft for the principal of the notes and the accrued interest. I have not the letters of Mr. Honoré, spoken of, in my possession. I think they must have been attached to the draft and papers that went to New York, and Boston, as stated. I cannot find them and I do not know where they are.

(Counsel for plaintiff objected and here objects to the introduction of the statements of Mr. Honoré to witness, whether by letter or otherwise and objects to all the above answer (6) as being incompetent and irrelevant, and hearsay.)

Q. 7. Have you any personal knowledge of what became of those drafts and notes after they were sent to Boston as stated?

A. 7. I have not.

Q. 8. As a matter of fact, of your own personal knowledge, do you know whether that particular draft was paid, or the money obtained upon some other draft?

A. 8. I do not know of my own personal knowledge.

Q. 9. After you sent the draft and notes to Boston have you any knowledge of what transpired in reference to the notes or draft, except that you got your money?

A. 9. I have no knowledge of what became of the draft after it was deposited with the bank for collection. I only know I got my money.

Q. 10. In that transaction between you and Mr. Honoré or others, as the case might be, was it understood by you that these notes were to be paid?

(Counsel for plaintiff objects to this question as "leading and incompetent.")

A. 10. It was my understanding that it was a sale, and not a payment of the notes. The arrangement between Mr. Honoré and myself was that the notes were to be endorsed "without recourse," and not marked "paid." He offered the St. Louis Life Insurance Company a commission of two and a half (2½) per cent. and ten (10) per cent. interest to renew the notes for him twelve months longer.

(Counsel for plaintiff here objects to this answer on the ground of its being hearsay and incompetent.)

Q. 11. You say "the arrangement between Mr. Honoré and yourself was that the notes were to be endorsed 'without recourse' and marked paid.'" Now state under what arrangement you forwarded these notes, and draft to the Atlas National Bank, as you have stated.

A. 11. The understanding was that if I would endorse these notes "without recourse" and send them to the Atlas National Bank Mr. Doane would take them up, or, rather, advance us the money on them. That was the arrangement under which they were sent.

Q. 12. Did you ever have any conversation with Mr. H. H. Honoré in reference to these notes previous to or about the time they were forwarded to the Atlas National Bank, as you have stated?

A. 12. Yes. Between the 15th January, 1874, and the 1st of June, 1874, I had conversation with him four or five different times in reference to these notes, at which times he assured me that he could only pay the company by finding somebody who would buy the notes from us.

(Counsel for pl'ff here objects to the introduction of any statement made by Honoré at that time.)

Q. 13. In making this arrangement by which Mr. Doane was to advance this money, as you have stated, did you have any negociations with any persons other than Mr. Honoré; I mean personally.

(Counsel for plaintiff objects to this question as "leading" and assuming the existence of facts not legitimately in evidence.)

A. 13. I did not.

Q. 14. In that arrangement whom, if any one, did Mr. Honoré profess to represent?

(Counsel for plaintiff objects to this question as leading.)

A. 14. Mr. Doane.

Q. 15. Has any one, Logan O. Swope or any one for him, ever demanded of your company satisfaction of that deed of trust securing these notes?

A. 15. No one, to my knowledge.

Q. 16. Are you acquainted with Logan O. Swope?

A. 16. I am.

Q. 17. How long have you known him?

A. 17. Since January, 1874.

Q. 18. Did you ever have any conversation with him about these notes?

A. 18. I have. I offered to sell them to him once.

Q. 19. Are you acquainted with Thomas H. Swope?

A. 19. I am not.

Q. 20. Did you any time inform Logan O. Swope that you had sent these notes to Boston, as stated?

A. 20. I don't think I ever told him I had sent them to Boston, but did tell him I was going to sell them, and that he could have them for the amount of the principal and interest, and I afterwards told him I had sold them.

Q. 21. Do you remember what reply he made?

A. 21. I don't remember the exact words, but he impressed me with the idea that he would not buy the notes, but would bid the amount of the notes and accrued interest for the property if sold under deed of trust securing same.

Q. 22. How soon after selling the notes did you tell him?

A. 22. I couldn't say exactly. It wasn't a great while after the notes were sold, but couldn't say whether it was thirty, sixty, or ninety days after the transaction.

Q. 23. Is there anything more with reference to these notes of which you have knowledge but haven't mentioned?

A. 23. I believe not.

Cross-examination of A. M. Britton.

Cross-examination by E. B. SHERZER, Esq., counsel for plaintiff:

Q. 1. You state you had conversations with reference to these notes with Mr. Honoré in St. Louis. State when and where.

A. 1. They took place in the office of the St. Louis Life Insurance Company, and in the early spring and summer of 1874. I don't exactly remember the dates, but I can get information at the office by which I can be exact as to the dates.

73 Q. 2. Will you then get that information so that you can give the exact time and number of conversations had with him in reference to these notes?

A. 2. I can, by Monday, and will.

Q. 3. You cannot now remember what time or month in spring or summer those conversations took place?

A. 3. No; I leave all that till I get the dates.

Q. 4. You say, in your direct examination, Honoré professed to buy the notes for Doane; please state the conversation in question.

A. 4. I never had any conversation with Mr. Honoré when Doane's name was mentioned; that is, with reference to this purchase. Mr. Honoré wrote me that if Albert Todd would certify that the title to the property securing the note was good—that Mr. Doane would buy the paper.

Q. 5. When was that?

A. 5. In June, 1874.

Q. 6. Have you that letter?

A. 6. I have not.

Q. 7. Then, it is from that letter that you get the idea that he professed to buy the notes?

A. 7. Yes; from that letter and other letters.

Q. 8. Have you the other letters?

A. 8. I have not.

Q. 9. When were the other letters written?

A. 9. About the same time, or within a month or so of it.

Q. 10. Did the Mound City Life Insurance Company own these notes

at any time previous to its re-insurance of the St. Louis Mutual Life Insurance Company?

A. 10. It did not.

Q. 11. Did I understand you to say in your direct examination that Mr. Honoré told you in any of the conversations had with him, at the St. Louis Life Insurance Company's office, or elsewhere, of any arrangements made with any party or parties for the transfer to them of these Swope notes?

A. 11. He did not speak of any party or parties; he spoke of somebody that he would like to make arrangements of that kind with, but didn't mention any name. He offered to pay me a commission if I would find some party in St. Louis to buy them.

Q. 12. Can you give the exact language, or the substance of it, that he used in these conversations with you?

A. 12. No; I can't give his exact language.

Q. 13. These conversations were before the transfer to Doane was made?

A. 13. Yes.

Q. 14. Can you give the substance of these conversations with Mr. Honoré?

A. 14. I couldn't undertake to give the exact language. I can only give my understanding of what it was.

Q. 15. How often was this property advertised by the St. Life Insurance Company?

A. 15. Once, to my knowledge. It was advertized once before by the St. Louis Mutual Life Ins. Co., to my knowledge.

Q. 16. Was the property sold under these advertisements?

A. 16. It was not.

Q. 17. Why not?

A. 17. The board of directors ordered it otherwise.

Q. 18. Wasn't it for the reason that some money upon the notes was paid by Mr. Honoré, or some one for him?

A. 18. It was not.

Q. 19. Will you say that no money was paid upon the notes by Mr. Honoré at that time?

A. 19. None, to my knowledge, was paid upon the notes or the interest. I think Mr. Honoré only paid the costs of advertizement.

74 Q. 20. Was there any other money paid by Mr. Honoré other than this payment for advertizement?

A. 20. I think there was on notes made by Theodore Laveille & Ashley McKinley which had been assumed by Mr. Honoré.

Q. 21. Was there any money paid to the directors or officers of the company by Mr. Honoré, not to be applied on these notes, as consideration for withdrawing the advertisement?

A. 21. No, sir.

Q. 22. How did Mr. Honoré pay for this advertisement; by money or draft?

A. 22. I don't know, but think it was by draft on H. C. Bowen, of Chicago.

Q. 23. Had the St. Louis Life Insurance Company ordered the advertisement?

A. 23. It had.

Q. 24. When was that advertisement?

A. 24. I don't remember; probably in April or May of 1874. I think the draft on Bowen was paid in the winter; it was drawn at the same time the advertisement was paid for. In reference to this draft, I would

say: At the time of the first advertisement by the St. Louis Mutual Life Insurance Company, which we became in control of, Honoré drew a draft on Bowen for $5,000, which, I think, was to be applied on the notes of Laveille & McKinley—the more I reflect about it, I am rather of opinion that the advertisement was not paid out of this draft. * * * The witness desires to correct his testimony of Saturday, October 16th, '75, in the following particulars, namely; In answer to question 1st in cross-examination I wish to substitute "about January 23d, 1874, and June 16th, 1874," for the statements "in the early spring & summer of 1874." I also wish to substitute for the answer to question 19th in cross-examination the following, viz: "The property was advertized for sale on or about the 23d of January, 1874, by the St. Louis Mutual Life Insurance Company; the executive committee of the St. Louis Life Insurance Company ordered the sale postponed, at the solicitation of Mr. Honoré. At that time Mr. Honoré paid $1,192.29, which was appropriated as follows: $1,152.29 to the payment of the interest on the notes of L. O. Swope; $5.20 protest fees; & $34.80 for advertisement. At the same time he gave the company a draft for $5,000 on C. H. Bowen, to be credited on one of these notes when paid; said draft was protested for non-payment, & afterwards returned to Mr. Honoré. The St. Louis Life Insurance Company advertised the same property & other property securing the notes of Laveille & McKinley, which had been assumed by Mr. Honoré, to be sold on or about the 16th of June, 1874; and again, at the solicitation of Mr. Honoré, the executive committee postponed the sale. At this time Mr. Honoré paid a note of Laveille & McKinley for $1,960, & interest on same, $86.89, & interest on Swope's notes, $1,025.47; advertizing Swope notes, $39.00; advertizing Laveille & McKinley notes, $52.25; protest fees, $4.16; & writing advertisement, $5. At the same time, he agreed to pay one per cent. in addition to ten per cent. interest if we would give him 30 days additional time, & gave us a draft for $3,000, out of which to pay this one
75 per cent., & the balance to be forfeited to the company in case he did not find some one to buy the notes within thirty days."

I make these corrections after referring to the books of the St. Louis Life Insurance Company.

Q. 25. Upon whom was this $3,000 draft?

A. 25. My impression is, it was a draft on New York, by some bank in Chicago—a sight draft. I don't know whether it was payable to Honoré's order or not—I know it was paid.

Q. 26. Did you forfeit any part of that $3,000?

A. 26. No, sir; all, except $316.16 commissions, and 134.47 interest, was returned to Honoré.

Q. 27. The first draft you speak of, on whom was that?

A. 27. It was drawn by Honoré on Bowen, and accepted by Bowen, but not paid.

Q. 28. How was the $1,192.29 paid, by draft or money?

A. 28. I can't tell; it is only credited cash, on our books.

Q. 29. Is the statement you make from the memorandum in your hand, taken from the books of the St. Louis Life Iusurance Company?

A. 29. It is.

(Witness here says he wishes to correct his answer to question 8 of the cross-examination, in which he said he "did not have the other letters" and adds that he has searched for those other letters since his examination on Saturday last, & that he had found them, & has them with him.)

Q. 30. Are the letters you say you have found, all the letters or cor-

respondence that passed between Mr. Honoré & the St. Louis Life Insurance Company, or the officers thereof, on the subject of the Swope notes?

A. 30. I don't think they are all we received, but they are all I can find on file.

Q. 31. As the vice-president of the St. Louis Life Insurance Company you have a great deal of business to do, do you not?

A. 31. Yes, sir.

Q. 32. These transactions you have spoken of in your direct examination in reference to the Swope notes, & the conversations with Honoré in regard thereto, took place more than a year ago, did they not?

A. 32. Yes, sir.

Q. 33. As to what then occurred, you have no distinct recollection except what you have gathered from the correspondence in regard thereto?

A. 33. I recollect very distinctly having conversations with Mr. Honoré in regard to taking up these notes?

Q. 34. Have you not now an impression, rather than a distinct recollection of what these conversations were?

A. 34. Although I don't remember the exact words Mr. Honoré used, I remember the substance of them.

Q. 35. What did he say?

A. 35. He said he could not procure a new loan on the property, because Mr. Swope held a second mortgage, & that the only way he could pay the St. Louis Life Insurance Company, was to find somebody who would buy the notes without recourse to the company.

Q. 36. Was that the exact language he used?

A. 36. I don't know whether that was the exact language he used; that is the substance of it, however.

Q. 37. That is, it is your understanding?

A. 37. No; it is my recollection that the language used meant that.

76 Q. 38. He didn't want the notes marked paid, & you endorsed them without recourse?

A. 38. Yes, sir.

Q. 39. And you gather from that that he was not paying the notes, at the time that he requested you to draw on him for the amount of same?

A. 39. Not entirely from that fact, but I was induced to believe that we were selling the notes, from his letters and conversation.

Q. 40. You have given your recollection of your understanding of his conversations, & you have not found all of his letters or correspondence in reference to this transaction, so that you come to the conclusion that this was a purchase of the notes, from such letters as you found, & from the fact this note was endorsed by the company without recourse & not marked paid, & from your understanding of the conversation had between Honoré & yourself, do you not?

A. 40. I have given the substance of his conversations according to my recollection, & I was led to believe that it was a sale of the notes from these conversations & letters received. I don't think I have been able to find all the letters received on this subject. The notes were endorsed "without recourse" as per arrangement with Mr. Honoré, & the order of the executive committee.

Q. 41. You don't know what arrangement Honoré made with that executive committee, except as you have been informed, do you?

A. 41. Mr. Honoré had no arrangement with the executive committee

relative to the endorsement of the notes. I got an order of the executive committee authorizing me to endorse the notes "without recourse" instead of marking them "paid."

Q. 42. Was Honoré here in 1874, and did he then have any communication with you or with your company with reference to these notes?

A. 42. I have seen Mr. Honoré once or twice since those notes were paid, but think it was since July, 1874.

Q. 43. Didn't you see him in July, 1874, & before the notes were paid?

A. 43. I have no recollection of seeing him between the time his sale was postponed & the notes were paid, but may have done so.

Q. 44. When was the sale you refer to postponed?

A. 44. On or about the 16th of June, 1874.

Q. 45. You were paid the principal & interest of these notes by a draft drawn on Mr. Honoré, through the National Bank of the State of Missouri, on the Atlas National Bank of Boston, were you not?

A. 45. We were.

Q. 46. You drew two drafts on Mr. Honoré, signed by yourself as vice-president; one for $31,610.30; & the other for $80.31, on the Atlas National Bank of Boston; the first draft being the principal & interest on the Swope notes up to July 16th, 1874, & the other being the interest from that date to July 22d, 1874?

A. 46. I have no recollection of there being two drafts, but we drew on him for the interest that had accumulated after the 16th of July, up to the time we presumed it would take the notes to go to Boston & be paid.

77 Q. 47. Then, as I understand you, these Swope notes were paid to you by the draft drawn on Honoré for the principal & interest of the same, through the National Bank of the State of Missouri, on the Atlas National Bank of Boston?

A. 47. We received the proceeds of those notes through that channel.

Q. 48. Is that the only way?

A. 48. That is the way the money was received.

Q. 49. That is, you drew on Honoré for the principal & interest of the Swope notes through the National Bank of the State of Missouri on the Atlas Bank, attached the deed of trust and the notes? The draft was paid?

(Counsel for defendant here enters his objection to the counsel for plaintiff testifying himself.

Counsel for plaintiff objects to the interposition and interruption of defendant's counsel, & insists that the question as put heretofore shall be answered by said witness without interruption from said counsel.)

A. 49. The draft was finally paid.

Q. 50. That particular draft was paid within a reasonable time after it was presented, wasn't it?

A. 50. Yes.

Q. 51. You drew one on Honoré for the principal & interest of these notes about July 22nd, 1874, through the National Bank of State of Missouri on the Bank of Commerce. That went to protest, didn't it?

A. 51. The draft on Honoré through the Bank of Commerce went to protest and was returned to St. Louis; was then forwarded to the Atlas National Bank, protested there, but was paid a few days afterwards.

Q. 52. All that accompanied that draft were the notes & deed of trust, was it not?

A. 52. I have always been under the impression that some one of his letters accompanied the draft, but I may be mistaken. They were let-

ters showing the authority for drawing the draft. I remember ordering them to go, but don't know whether they went or not.

Q. 53. Did Honoré at any time draw upon Bowen for about $6,000 to be applied on these Swope notes, and give that draft to the company?

A. 53. He gave the draft of H. C. Bowen for $5,000, to be applied on these Swope notes when paid. The draft was protested for non-payment & afterwards returned to Mr. Honoré.

Q. 54. Have you given all of the payments made by Honoré, whether by draft or otherwise, to the St. Louis Life Insurance Company on these notes?

A. 54. With one exception, I have. He paid us the accrued interest, accrued after the calculation was made of the amount due in Boston, & the date of the payment of the draft in Boston—in amount about $134. The drafts heretofore alluded to were for the principal & accumulated interest to a certain day in July; the last payment being for the interest from that date in July to the payment of the first draft.

Q. 55. I believe you said you couldn't give the exact language of the conversation between Honoré and yourself in regard to these notes?

A. 55. I do not remember the exact language, but I have given my recollection of the conversations as I understand them.

Q. 56. How many conversations had you with Honoré?

A. 56. I don't remember. I had a great many.

Q. 57. The last conversation was some time before the last draft
78 was drawn, wasn't it?

A. 57. I have no recollection of any conversation with Mr. Honoré between about the middle of June, 1874, & the date of the payment of the drafts.

Q. 58. You can't give the exact language; can you give nearly the exact language he made use of?

A. 58. I can't give the exact language; I have given the substance of it, to the best of my recollection.

Q. 59. Give the substance in nearly as exact language as you can.

A. 59. Mr. Honoré said he was unable to negotiate a new loan on this property for reasons I have before stated in this same connection, I don't pretend to give or to have given his exact words; only the substance of them.

Q. 60. What do you mean by the substance?

A. 60. Mr. Honoré was urging us not to sell his property, & that was the substance of the language used to convince us that he was using every effort in his power to find some party who would buy those notes as an investment.

Q. 61. Do you expect to leave the city within two or three months?

A. 61. I have no idea at present of leaving it.

Q. 62. Had you any such intention on or about the 12th of October, 1875?

A. 62. I don't know as I had.

Q. 63. Did you state to anybody on or about that time that you were going to leave?

A. 63. I have no recollection.

Q. 64. Your duties as vice-president of the company require your presence here all the time or nearly all the time, do they not?

A. 64. No; they frequently call me away from the city.

Q. 65. For how long a time are you gone when you go?

A. 65. Well, I have been gone as long as a month.

Q. 66. Is that a usual or unusual length of time for you to be gone?

A. 66. It is rather an unusual length of time.

Q. 67. What is the usual length of time that you are gone?

A. 67. Well, I am rarely ever absent longer than two weeks at a time.

Q. 68. Do you go away seldom or often?

A. 68. I frequently go away; rarely a month that I don't go away somewhere.

Q. 69. You don't know whether you will be absent or not when this case is tried do you?

A. 69. I don't know whether I will be or not.

Q. 70. Did you address a note about July last to Mr. Doane of Chicago stating that the Swope notes were paid by draft on H. H. Honoré?

A. 70. I don't remember whether I wrote Mr. Doane a letter or not.

Q. 71. If he says you did, through Mr. Block, & the letter should be to that effect, would you have any doubt but that you did so write him through Mr. Block at your direction?

A. 71. I never, to the best of my recollection, wrote Mr. Doane a letter conveying any other idea than that the company sold the notes; & I have no recollection of ever ordering Mr. Block to write Mr. Doane a letter on any subject.

Q. 72. I believe you stated that the last advertisement for the sale of this property was withdrawn at the request of Mr. Honoré, & that he paid the costs of such advertisement?

A. 72. I so stated.

Q. 73. How many letters of Mr. Honoré have you with you?

A. 73. Three.

79 Q. 74. Can you so mark them as to identify them in case they should be called for hereafter; and will you please give to the notary the dates of the same?

A. 74. No. 58, dated May 8th, 1874; No. 105, dated July 1st, 1874, & No. 174, dated July 29th, 1874.

Q. 75. Did you state at any time, in the office of the company, to Mr. L. O. Swope, in reply to a question addressed you by him, *to* as to what had become of the Swope notes, that Honoré, or some one for him, had taken them up?

A. 75. I informed Mr. L. O. Swope that the company had sold the notes to some friend of Mr. Honoré; I cannot swear to the language used at the time.

Q. 76. Can you swear that you didn't say or tell him in this language, "that they were taken up," when he made that enquiry?

A. 76. I cannot swear to the language used.

Q. 77. May you not have used the words "that they were taken up"?

A. 77. I have no recollection on that subject. I don't know whether I did or not.

Q. 78. Neither to Mr. Logan O. Swope nor to Thomas Swope?

A. 78. I don't think I ever saw Thomas Swope.

Q. 79. You have received a number of letters from Mr. Honoré in reference to this matter other than those you have identified here, haven't you?

A. 79. I think I have.

Q. 80. What has become of them?

A. 80. I don't know.

Re-examination of A. M. Britton.

Redirect examination by J. C. ORRICK, Esq.:

Q. 1. Will you produce those three letters which you say you have

from Mr. Honoré, & which you have identified in your cross-examination?

A. 1. Yes, here they are. (Witness here produces the letters, marked Exhibit A, B, & C, & filed as exhibits with this deposition.)

Q. 2. Are you acquainted with the handwriting of Mr. Honoré?

A. 2. Only as produced in those letters.

Q. 3. How did you receive those letters?

A. 3. I received the one addressed to Mr. Laveille through Mr. Laveille; the others I received through ordinary course of mail.

Q. 4. In this letter of July 1st, 1874, to you, Mr. Honoré says: "When I was in St. Louis a few weeks ago, arranging my matters with you, there appeared to be a slight prospect that the Swope notes, &c., would be taken up by some person there; if not, you can send them to New York, as per our agreement." Now please state to what agreement Mr. Honoré referred.

(Counsel for plaintiff objects to this question on the ground of it not being gone into on the cross-examination & as being incompetent. Counsel for defendant claims that, inasmuch as these letters have been found since he closed his examination-in-chief, he has a right to re-examine witness as to said letters & as to any other data witness has produced since his examination-in chief on Saturday.)

A. 4. The only arrangement I had with Mr. Honoré was that if he found any one to buy the notes, we would endorse them "without recourse" & sell them.

Q. 5. You say the last conversation you had with Mr. Honoré
80 relative to the Swope notes was about June 16th, 1874. With reference to that time, when was the arrangement of which he speaks in this letter of July 1st made?

A. 5. It was during the visit of Mr. Honoré to St. Louis, about the 16th of June,'74, that the arrangement referred to was made. The arrangement spoken of was my agreement to endorse the notes "without recourse" & sell them.

Q. 6. Did you send them to New York, as requested in this letter of July 1st, 1874?

(Plaintiff's counsel objects to this question as leading & incompetent.)

Q. 7. Why did you send them to New York?

A. 7. To get the money on them.

Q. 8. Under what arrangement or agreement, if any, did you send them to New York?

(Plaintiff's counsel objects to this question as leading & incompetent & its matter having been gone into in direct examination.)

A. 8. Under the agreement that I would endorse them "without recourse" & sell them.

Q. 9. When did you receive the next letter from Mr. Honoré after July 1st, 1874?

A. 9. I don't remember.

Q. 10. Do you remember receiving any letter from him between July 1st & July 29th, 1874?

A. 10. I received either letters or dispatches.

Q. 11. Why did you afterwards forward the notes to the Atlas National Bank of Boston?

A. 11. I was instructed to do so by Mr. Honoré by letter of date July 29th, 1874.

Q. 12. State whether there was any different arrangement from the one you have mentioned made by you with Mr. Honoré, when you sent

the notes to the Atlas National Bank, as instructed by letter of July 29th, 1874.

(Objected to by plaintiff's counsel as leading & otherwise incompetent.)

A. 12. There were no different arrangements. They were sent under the same agreement.

Q. 13. State if it was under that agreement that you got the money.

(Objected to by plaintiff's counsel as leading & otherwise incompetent.)

A. 13. It was, to the best of my knowledge and belief.

Q. 14. In answer to question 42, in cross-examination, you say, "I have seen Mr. Honoré once or twice since those notes were paid, &c.," & also, in your answer to question 43, you use the term "and the notes were paid." What do you mean by the expression in these two answers "the notes were paid"?

A. 14. That the St. Louis Life Insurance Company had received the proceeds of them.

Q. 15. Have you any personal knowledge of what became of the drafts that you sent to the Atlas National Bank?

(Counsel for plaintiff objects to this question as having been gone into in the direct examination.)

A. 15. I have not.

Q. 16. Have you any personal knowledge of what became of the notes & the drafts other than as you got your money?

A. 16. I have not.

Q. 17. You spoke in your cross-examination that Mr. Honoré had suggested that if the opinion of Mr. Albert Todd could be gotten that the title was all right to the property, he, Honoré, could secure a disposition of the notes; did you have any conversation with Mr.
81 Todd pursuant to that suggestion.

(Objected to by plff's counsel as incompetent.)

A. 17. I did.

Q. 18. State what occurred between you & Mr. Todd.

(Objected to by pl'ff's counsel as incompetent & hearsay.)

A. 18. I remember going to Mr. Todd on receipt of a letter from Mr. Honoré, & asking him to certify that those notes were the first lien on the property, & he declined to do it unless I would guarantee that he would get his fee, which I declined to do. By the same mail Mr. McKinley received a letter from him. He, McKinley, guaranteed the payment of Mr. Todd's fee, who then made out the certificate & gave it to Mr. McKinley.

Q. 19. You speak of having received a number of letters from Mr. Honoré other than those produced; did you receive a number of letters from Mr. Honoré, not produced, about these Swope notes?

A. 19. All the letters I received from him were relative to his two loans, the McKinley & the Swope notes.

Q. 20. How many letters in reference to the Swope notes do you think you have not produced?

A. 20. I have no idea.

Q. 21. Did you receive any letters from Mr. Honoré after that of date July 29th, 1874, & before you received the money for the notes as you have stated?

A. 21. I did not.

Q. 22. State whether previous to the taking of this diposition you did not have a conversation with Mr. Orrick in which you stated it

might be inconvenient for you to be present at the trial, or might be called away by business engagements.

A. 22. I don't remember that. I remember, however, that I said I might have to go to New York to attend an insurance convention. This conversation took place in my office during fair week, & suggested that he put off taking depositions till the week after.

Q. 23. How did it happen that that note is endorsed "Wm. J. Lewis, pres't"?

A. 23. When the St. Louis Mutual Life Insurance Company assigned their assets to the St. Louis Life Ins. Co. Mr. Lewis, president of the St. Louis Mutual, endorsed all of their real-estate paper in blank, & as the St. Louis Life had assumed all the liabilities of the St. Louis Mutual, I wrote the words, "without recourse in law or equity," believing his endorsement would carry the title to the paper.

Q. 24. State in whose handwriting the words "without recourse in law or equity" just above the name of "Wm. J. Lewis, pres't" in each of these notes are.

(Plaintiff's counsel objects to the question as having been gone into in the direct examination.)

A. 24. The words "without recourse," I think, were written by Mr. W. H. Block, cashier of the St. Louis Life Ins. Co.; the words "in law or equity" were written by myself.

Q. 25. Can you state when you wrote those words?

A. 25. The day the notes were delivered to the National Bank of the State of Missouri to be forwarded to New York as before stated.

Recross-examination of A. M. Britton.

Recross-examination:

Q. 1. Who was present at these conversations with Honoré?

A. 1. I don't remember.

Q. 2. Was anybody present?

82 A. 2. I don't think anybody was.

Q. 3. When was this conversation had with Mr. Todd?

A. 3. I don't remember.

Q. 4. You said in your redirect examination that these notes were to be sold; do you get that idea other than from your recollection of the conversation had with Mr. Honoré as you have before in this deposition stated?

A. 4. From those conversations & the letters received from Mr. Honoré.

Q. 5. You say that there was an agreement, as I understood you in your redirect examination, in explaining the word "arrangement" in letter of July 1st, for a sale of the notes. Now, do you mean any more than that you gathered that idea from those conversations & letters as stated?

A. 5. The conversations I had with Mr. Honoré were so plain that it was impossible that I could have considered it in any other light than as a sale of the note, & Mr. Honoré could not have understood his position otherwise than as being in the market in search of a capitalist who would purchase those notes from the St. Louis Life Insurance Company.

Q. 6. Now, if the language was so plain, how does it happen that you can't recall nearly the exact words that he made use of?

A. 6. I can't tell that.

Q. 7. You can't recall the language at all, can you?

A. 7. I cannot, & I do not pretend to.

Q. 8. Then you only give your understanding of the conversation or conversations had with him & the letters you received?

A. 8. I give the substance of them according to my best recollection.

Q. 9. Now, I ask you again; please state what you mean by substance.

A. 9. I mean by it, that I give the points he aimed at, namely, that he wanted us to sell the notes to some one that he might find to buy them as an investment.

Q. 10. I repeat the question.

A. 10. That is as good as I can give to it.

Q. 11. Is that the only answer you can give?

A. 11. It is as good an answer as I can give; that was the substance of those conversations about those notes.

Q. 12. How can you get the substance of those conversations if you can't recollect the language used?

A. 12. I had no particular reasons for taxing my memory with the words that he used. My object & interest was to remember the objects he had in view.

Q. 13. Then you mean to say you gathered from his conversation that the object he had in view was to sell the notes?

A. 14. The object he had in view was to find a purchaser for the notes.

Q. 14. That you gathered from his conversation, as I understand it?

A. 14. Yes, sir.

Q. 15. Though you cannot recollect the language made use of by him at those times?

A. 15. I do not remember the language made use of at those times & don't pretend to.

Q. 16. Can you give it nearly?

A. 16. I said I don't pretend to.

A. M. BRITTON.

Subscribed and sworn to before me, on the 20th of October, 1875,
83 at the place & within the hours last aforesaid. Said deposition, owing to the lateness of the hour, having been left open for that purpose, by agreement of counsel.

[SEAL.] ROBT. HARBISON,
Notary Public St. Louis Co. Mo.

Qualified Jan'y 10th, 1874. Commission to expire Jan'y 4th, 1878.

9th. Also, exhibits to the foregoing depositions marked, respectively, "A," "B," & "C," as follows:

Exhibits in Britton's deposition marked A, B, & C.

EX. A.

CHICAGO, *May 8th*, 1874.

Mr. LAVEILLE:

DEAR SIR; I am just on the eve of departure for Louisville, Ky., and as soon as I return, which will be about middle of next week, I will see

what I can do about my matters in St. Louis. In the mean while I hope you will do nothing that jeopardize my interest by letting the property be advertized until I can see what I can do.

Yours, truly,

H. H. HONORÉ.

EX. B.

CHICAGO, *July 29th*, 1874.

Mr. A. M. BRITTON, *St. Louis, Mo.:*

MY DEAR SIR: I was very much surprized and annoyed to-day when I rec'd your T. D. saying that those Swope notes had not been paid, for, from the arrangements that I had made, I felt no doubt as to the result. Nearly two weeks ago I made arrangements with Mr. J. W. Doane, of this city, to take up the notes, but when he arrived in New York found that they had been returned to St. Louis, & sent me the following T. D.:

"NEW YORK, *July 21st*, 1874.

"H. H. HONORÉ, &c.:

"Papers have all been returned to St. Louis. Have them forwarded to Atlas National Bank, Boston, & I will carry out the contract.

"J. W. DOANE."

After requesting you to forward the papers to Boston, I gave myself no further trouble, thinking that matters would be closed up all right, & the first intimation that I have had to the contrary was your T. D. of to-day. I immediately telegraphed you as follows:

"Am surprized notes are not paid. Can't tell why. Hold them at Atlas Bank. Have telegraphed Doane to pay them;" and at the same time sent a message to Doane at two places, so that one of them will be sure to reach him. I have directed him to answer at once, & when I hear from him I will advise you, which will probably to-morrow or next day.

Mr. J. W. Doane is one of our largest grocers, & a man of means & reliability, & he is also one of the largest buyers of securities we have, & his failure to take up the notes completely mystifies me. I can only attribute it to some slip or mistake. All I ask is for you to hold the notes in Boston until I can get some word from Doane and advise with him. This is important.

84 You see, Mr. Britton, that I have acted in perfect good faith, & the failure is no fault of mine. I still feel confident that Doane will take the paper, & hope you have not withdrawn it.

Don't advertize for a little while yet, for I have no doubt but the next two or three days will clear up the whole matter.

I herewith enclose Doane's dispatch, which please return to me.

Yours, truly,

H. H. HONORÉ.

EX. C.

CHICAGO, *July 1st*, 1874.

Mr. A. M. BRITTON,
V. P., St. Louis, Mo.:

DEAR SIR: When I was in St. Louis a few weeks ago, arranging my matters with you, there appeared to be a slight prospect that the Swope

notes (amounting to some $31,000) would be taken by some person there. Please advise me if this arrangement has been consum'ated. If not, you can send them to New York, as per our agreement, letting me know where they are payable there. I have an idea that they were to be sent to the N'l B'k of Commerce, but am not certain enough to depend on it.

Yours, truly,

H. H. HONORÉ,
P'r ESSEX,
192 *Dearborn st.*

10th. Deposition of Charles L. Lane, which is as follows:

Deposition of Charles L. Lane.

CHARLES L. LANE, of lawful age, is produced and sworn on the part of the defendants.

Direct examination by S. W. BATES, Esq.:

Q. 1. What is your name, age, residence, and occupation?

A. Charles L. Lane; 48 years old; I reside in Boston, and am the cashier of the Atlas National Bank.

Int. 2. Are you acquainted with the parties to this suit, to wit, Logan A. Swope, plaintiff, vs. Hiram W. Leffingwell, Henry H. Honoré, Chauncey I. Bowen, John W. Doane, and the Atlas National Bank of Boston?

A. With only one of them—Mr. Doane. I am acquainted with the bank, of course.

Int. 3. Do you know anything about three notes signed by Logan A. Swope, dated December 26th, 1871, for $12,586.65, $11,946.65, $11,306.65, due in one, two, and three years from date respectively, and a deed of trust given by said Swope to secure the same; and, if so, what?

A. I do know them. They are the property of the Atlas National Bank.

Int. 4. State how the bank acquired the ownership of the same.

A. On the 27th day of July, 1874, the bank discounted a note of C. T. Bowen, payable to his own order, and falling due October 19th, 1874, for $32,805.97, and took those three notes and deed of trust as collateral security for it. About the time the note became due the bank renewed the note by discounting a new note of Bowen, endorsed by H. H. Honoré, for 32,500, payable January 11th, 1875, with the same col-
85 lateral. About the time the second note became due the bank renewed this second note by discounting a new note of Bowen, endorsed by Honoré, for $32,500, payable April 14th, 1875. About the time this last note became due the bank sent this third note of Bowen, together with the deed of trust and three notes of Swope, to J. W. Doane for collection; since which time I have not seen either of said notes or deed of trust, but was informed by Mr. Doane that the said collateral had been sold under the provisions in Bowen's note, and had been bought in by him on behalf of the bank.

Int. 5. State all the circumstances connected with the discount of Bowen's note, how and from whom you received it, and how and from whom you received the deed of trust and the Swope notes?

A. I cannot state all the circumstances connected with the discount of the note, because the arrangement and agreement for discount were made by Mr. Doane, our agent; and I only know about the agree-

ment from what Mr. Spaulding, the president of the bank told me at time of the discount, and what Mr. Doane, has told me since. All I personally know about it, is that on the 19th of July I received this dispatch:

"Western Union Telegraph Company 114193, 1874, dated Chicago, 19, 187 . Received at 12.30 July, 19.
To M. D. SPAULDING, *Pres't Atlas Nat. Bank:*
"Please write Importers & Traders Bank, New York, to honor my check thirty-two thousand eight hundred & five dollars for papers bought on your account, which I will forward from there.

"J. W. DOANE."

I certify that the above is a correct copy of the original despatch exhibited by the witness to me.

CHAS. H. SWAN,
Notary Public.

As it was quite common for the bank to receive despatches like this from Doane, I sent that day to New York a letter and read from our letter book a press copy.

JULY 20TH, (187)4.

E. H. PERKINS, Jun. Esq., *Cashier, New York:*

DEAR SIR: Will you please pay check of J. W. Doane or J. W. Doane & Co. ($32,805.00) thirty-two thousand eight hundred and five dollars and charge our account.

Truly yours, CHARLES L. LANE,
Cashier.

The above is a true copy of the press copy produced in the letter book by the witness.
Attest:

CHAS. H. SWAN,
Notary Public.

A few days afterward I received the deed of trust and the three Swope notes and two drafts enclosed with this letter:

86 "NATIONAL BANK OF THE STATE OF MO. IN ST. LOUIS.
St. Louis, July 22, 1874.

"To the Cashier of the Atlas Nat'l Bank, Boston, Mass.:

"DEAR SIR: I enclose herein for collection remittance to Nat'l B'k Commerce, N. Y.:

"Britton V. Pt. on Honoré $31,610 30
" " " 80 31

also three notes of L. O. Swope with deed of trust securing same. Upon paym't of the two d'fts please surrender notes & deed trust. If not paid please hold & advise us.

"Yours respectfully,

"EWD. P. CURTIS,
"*Cashier.*"

The above is a true copy of the letter produced by the witness, and

X 15. What was said?

A. I had received two drafts on Mr. Honoré, with some notes of L. O. Swope and trust-deed accompanying, from the Nat'l Bank of the State of Mo., in St. Louis; I was to send that amount, it being the amount of the larger of the two drafts, and return the smaller one.

X 16. Didn't you know at the time, that Honoré owned the Bowen note, or that it came to the bank through Honoré?

A. No, sir.

X 17. To whose order was the Bowen note payable?

A. I think to his own order.

X 18. How do you know that?

A. If it had been to the order of anybody else, our books would, or should, show it.

X 19. What is your custom with regard to the entry of such notes on your books?

A. The promisor is entered in one column, and the endorsers in another. If there is simply a promisor and no endorser, but collateral with the note, we enter the word "collateral" in the second column.

X 20. You had, then, received the draft on Honoré, had you not, in connection with the Bowen note, and the Swope notes?

A. No, sir; in connection with the Swope notes.

X 21. Well, the Swope notes were connected with the Bowen note, were they not?

A. The president handed me the Bowen note, telling me to describe the Swope notes on the face of it, as collateral; that they were the papers Mr. Doane referred to in the telegraphic despatch, as I have just stated.

X 22. You say you received the draft on Honoré in connection with the Swope notes; on paying this draft on Honoré, then, did you not receive the Swope notes through Honoré?

A. No, sir.

X 23. How otherwise could you get the title to the Swope notes; it was by paying this Honoré draft, was it not?

A. When the letter was received containing the drafts on Honoré, I wrote to the cashier of the Nat'l Bank of the State of Mo., in St. Louis, that I couldn't find any such person in Boston; that I would hold the drafts subject to his order. A day or two after that the president of the bank handed me a note, signed by Chauncey T. Bowen, saying that the Swope notes had been bought for the bank by Mr. Doane, and they were to be taken as collateral for the Bowen note. He directed me to describe them in the collateral blank, and send $31,610.30 to the Nat'l Bank of the State of Mo., in St. Louis, and hand $6.47 to Mr. Doane when I saw him.

89

X 24. Did you not suppose that in paying the Honoré draft in connection with the Swope notes, that Honoré had something to do with the ownership of them?

(Objected to by counsel for defendants as assuming that the bank did pay the draft instead of paying out of the proceeds of the Bowen note, an amount which was the same as that of the Honoré draft.)

A. No, sir.

X 25. You said in your letter to the Nat'l Bank of the State of Mo., in St. Louis, that you had remitted to New York the amount of the Honoré draft, did you not?

A. The same amount as the Honoré draft. I wrote as follows: "I remit for your credit with Nat'l Bank of Commerce in New York this day our No. 8232, $31,610.30, draft on H. H. Honoré, $31,610.30.

X 26. Did you not then pay the Honoré draft?

No, sir; I didn't look at it so.

X 27. You said so, in substance, did you not, in the bank?

A. I think not.

X 28. Did you not suppose that Honoré owned these Swope notes, from the fact that the draft accompanying them was drawn on him?

A. I never thought anything about it.

X 29. Isn't that the natural inference, in your judgment?

No, sir.

X 30. How did you account for the draft being drawn on Honoré, then?

A. I didn't account for it when it was first received. I didn't know anything about it.

X 31. How could you account for it afterwards?

A. From explanations made by the president.

X 32. Did you know anything whatever then as to the ownership of the Swope notes, except what you learned from the president or Mr. Doane?

A. No, sir.

X 33. Where is the first Bowen note?

A. I don't know, sir. When the first Bowen note became due, or before it became due, the bank renewed the loan, and on taking a second note the first note was given up.

X 34. To whom was the note given up?

A. I think to Mr. Doane.

X 35. Don't you think it was to Mr. Honoré?

A. No, sir.

X 36. Who gave you the second Bowen note?

A. I think I received it from Mr. Doane by mail.

X 37. Who paid the discount on the second Bowen note?

A. The amount was placed to the credit of Mr. Doane. All this thing was done through Mr. Doane as our agent.

X 38. Don't your books here show who paid the discount?

A. No, sir. The books show to whom the proceeds of the note were credited. I will examine and give you the entries.

X 39. Was there any endorsement on the first Bowen note?

A. I think only Mrs. Bowen's endorsement. I think the note was payable to his order.

X 40. To whose order was the second Bowen note payable?

A. H. H. Honoré.

X 41. What was the reason for this change in the form of the second Bowen note, if you know?

A. I don't know, sir.

X 42. How do you account for it?

90 A. It is something I don't know anything about. We received the note as it came from Mr. Doane, our agent in Chicago.

X 43. On the renewal of the Bowen note, would you not naturally expect the second to be payable to the same order as the first?

A. Not necessarily.

X 44. Would you not infer from seeing the name of Honoré on the second Bowen note that he had some connection with the ownership of the first Bowen note and the Swope note?

A. No, sir.

X 45. Have you ever talked with Mr. Honoré about the ownership of these Swope notes?

A. I never saw Mr. Honoré or talked with him?

X 46. Do you know anything about the real transaction as to these Swope notes, except what you have learned from the president or Mr. Doane?

A. Nothing.

X 47. Have you the original Swope notes here?

A. I have not.

X 48. Where are they, if you know?

A. I don't know, sir. I suppose they are in the hands of Mr. Doane.

X 49. Where is the Honoré draft, if you know?

A. I think I gave it to Mr. Doane.

X 50. Who did you understand paid the discount on these Bowen notes? You say it is credited to Doane, but I suppose it is a mere matter of form in bookkeeping, is it not?

A. We only know Mr. Doane in the transactions, and we follow his directions. All the paper that he buys for us, the amount is credited to him, and he draws for it. I don't know who paid the discount. Mr. Doane acts as our agent in Chicago for the purchase of paper, uses his own judgment, and we follow his directions.

X 51. Who gave you the third Bowen note, and to whose order was that payable?

A. It came through the same hands (from Mr. Doane), and was payable to the order of H. H. Honoré.

X 52. Have the Swope notes been sold and bought in by your bank?

A. So I have been informed by Mr. Doane.

X 53. Whether or not you gave any instructions as to the sale of these notes?

A. Only the general instructions given to Mr. Doane by the president of the bank.

X 54. What were those instructions, if you know?

A. In all transactions for the bank, to act according to his best judgment.

X 55. Were there no specific instructions in this case, no letters from the bank?

A. None that I know of.

X 56. Have you ever seen the advertisement for sale?

A. No, sir.

X 57. In your letter of July 27, 1874, you say, "we have no order to pay" the draft for $80.31. What orders had you to pay the larger draft for $1,610.30?

A. Orders from the president.

X 58. In the same letter what do you mean by the words "we thought it for your interest to accept pay for larger amount to-day?"

A. That we should accept pay for larger amount—I mean the bank.

X 59. Explain more fully what you mean.

A. The proceeds of the discount were not sufficient to cover both drafts. I thought they would rather I would forward the amount of the larger draft than return the whole. By that I mean all the papers, the Swope notes and the deed of trust and drafts.

X 60. Did you not mean by the word "accept pay for larger
91 amount" that you paid the Honoré draft?

A. No, sir.

X 61. Isn't that the natural import of them?

A. That was not what I meant.

X 62. In your judgment is not that the natural import of the words, "accept pay for larger amount"?

A. I have to answer that question entirely in the light of the other

transactions. The money was not sent until after the Bowen note was received, and that only was in my mind.

X 63. Don't you think that the cashier of the St. Louis Bank, or any other third party, on reading your letter, would interpret the words "accept pay for larger amount" to mean that you had paid the Honoré draft?

A. Knowing nothing about the other transactions, I think he would.

X 64. What arragement, if you know, was made as to the payment of the smaller draft?

A. I have never heard from it since.

X 65. Don't you know whether it has been paid or not?

A. I do not.

X 66. These Swope notes were overdue, were they not, when you took them, and mortgage notes?

A. Two of them were overdue, and all notes secured by deed of trust.

X 67. Is it the custom of your bank to take such notes?

A. We have never taken them in any other instance that I know of.

X 68. Whether or not there was any conversation at the time they were taken as to the propriety of taking such notes?

A. There was not, that I know of.

X. 69. Did you understand that you had a right to take such notes, as a national bank?

A. The notes had been taken by our agent for the bank; I knew nothing about it.

X 70. Didn't you know that you had no right to take such notes?

A. I understand we had no right to take mortgage notes unless to secure overdue indebtedness.

X 71. Didn't it occur to you that these were such notes as you ought not to take?

A. I had a doubt about it at the time; I am not sure that we ought not.

X 72. Whether or not you expressed your doubt to any one?

A. No, sir; because I didn't know anything about it, till after the thing was done.

X 73. Have you examined your books and can you give us the entries called for in X 38?

A. I have since examined the books and find that instead of the proceeds of the discount being credited to Mr. Doane I received by mail this letter from Mr. Doane containing a check for part of the discount; the check was for $1,259.38.

(Witness here reads the letter, a copy of which is annexed to this deposition and marked Exhibit D.

CHAS. H. SWAN,
Notary Public.)

To this I replied Oct. 7th, 1874.

(Witness here reads from his letter book a press copy of the letter dated Oct. 7th, 1874, a copy of which is annexed to this deposition and marked Exhibit E.

CHAS. H. SWAN,
Notary Public.)

I have not a copy of the statement referred to in the letter, but it was in substance this: Amount of first note $32,805.97; proceeds of second note, $31,362.50; difference, $1,443.47; amount of check re-

ceived from Mr. Doane, $1,259.38; balance due the bank,
92 $184.09 I have no doubt I received the balance from Mr. Doane, though I have searched for his letter and cannot find it.

X 74. You cannot now tell who supplied the means to Mr. Doane with which he paid the discount, can you?

A. I cannot.

X 75. When you took the first Bowen note, upon which did you place the most reliance, the Bowen note or the Swope notes?

A. I didn't know anything about either.

X 76. Did you say that Mr. Honoré's name was on the first Bowen note in any way?

A. I think not; it was not, I think.

X 77. Are you sure that it was not on as endorser?

A. No, sir.

X 78. Whether or not you know from whom Mr. Doane received these Swope notes and the Bowen note?

A. I don't know.

X 79. Did you not understand from your conversations with the president that they came from Honoré?

X 80. Whether or not you are sure that the Honoré draft was handed to Mr. Doane?

A. I think it was.

X 81. Isn't it possible it was delivered to Honoré by the bank?

A. No, sir.

X 82. Can you give any further particulars as to the dates, amounts, and the names contained in the first Bowen note, further than you have already given?

A. I cannot.

Redirect examination of Charles L. Lane.

Direct examination resumed, Mr. BATES:

Int. 83. Referring to X 75, upon what reliance did you discount the Bowen note?

A. Mr. J. W. Doane.

Int. 84. Did you at that time know anything about the details of the arrangement made by Mr. Doane with Mr. Bowen, or anyone else?

A. Nothing.

Int. 85. At the time you discounted the Bowen note had you read the deed of trust of Swope?

A. No, sir.

Int. 86. Did you know whether the property conveyed in the deed of trust was personal property or real property?

A. I did not.

Int. 87. Do you now know, except by hearsay?

A. I think not. I don't think I have read it since.

Int. 88. From whom, if from any one, have you been told that the deed of trust conveyed real estate?

A. From Mr. Doane.

Int. 89. Can you tell when you first were informed of it; and, if so, when, as near as you can tell?

A. I cannot tell now, sir.

Int. 90. Has the question whether the bank had a right to take these notes ever been discussed by the board of directors in your presence; and, if so, when?

A. I think I never heard it mentioned until after the Atlas Bank was made a party to the suit.

Int. 91. Did you ever have any conversation with the president of the bank upon the question of the legality of the bank's taking these notes?

A. I think not.

CHAS. L. LANE.

Subscribed and sworn to before me on the day, at the place, and within the hours aforesaid.

[SEAL] CHAS. H. SWAN,
Notary Public.

11th. Also, Exhibits A, B, C, D, and E attached to the foregoing deposition, which are as follows:

93 Ex. A.

ATLAS NATIONAL BANK,
Boston, , 187 .

, Esq., *Cashier:*

DEAR SIR: Your favor of inst., is received with enclosures as stated.

You have credit $.

Respectfully, yours,

CHAS. L. LANE,
Cashier.

I enclose for collection.

Ex. B.

ATLAS NATIONAL BANK,
Boston, July 27, 1874.

EDW'D P. CURTIS, Esq., *Cashier, St. Louis Mo.:*

DEAR SIR: Your favor of 22 inst. is received with enclosures as stated.

You have credit $.

Respectfully yours,

CHAS. L. LANE,
Cashier.

I remit your credit with National Bank of Commerce in New York, this day. Our No. 8232, 31,610.30. Draft on H. H. Honoré 31,610.30. Draft $80.31 I return as we have no orders to pay same. Mr. J. W. Doane will be here in a day or two, and will undoubt'ly arrange it to your satisfaction. We thought it for your interest to accept pay for a larger amount to-day.

Ex. C.

ATLAS NATIONAL BANK,
Boston, July 27, 1874.

H. F. NAIL, Esq.,
Cashier, New York:

DEAR SIR: Credit acc't National Bank of the State of Mo., in St. Louis our No. 8232 ..... 31,610.30

(Thirty-one thousand six hundred and ten and $\frac{30}{100}$ dollars.)

Respectfully yours,

CHAS. L. LANE,
Cashier.
J. W. DOANE & CO.

Ex. D.

CHICAGO, *Oct. 3d*, 1874.

M. D. SPAULDING, Esq.,
P't Atlas Nat'l Bank, Boston:

DEAR SIR: Enclosed I hand you note of C. T. Bowen for 32,500. As good paper is not very plenty, I have taken the responsibility of accepting this note for the one of his similar amount due about the 20th inst., as the security to the note you have has been throughly looked up & with the prospect of money being plenty the balance of the year I have no doubt that you will be glad that I have made this trade. You will please fill up the body of the note with the same securities and return to me the old note and if it is any more than $32,500 I will send you the difference, if any loss you will please cr. our ac. The 94 enclosed check is for interest upon this note for the time it runs longer than the old one. In addition to this enclosed amount, if the note runs until maturity you are to receive 3 % extra interest, and if taken up during the next 40 d'ys the parties are to be allowed 10 % interest for unexpired time. I was obliged to allow them the option. I have no doubt that the security to this note is A 1, and such notes are not very plenty just now.

Yours, truly,
(Signed) J. W. DOANE.

Ex. E.

ATLAS NATIONAL BANK,
Boston, Oct. 7, 1874.

J. W. DOANE, Esq., *Cashier:*

DEAR SIR: Your favor of 2 inst., is received with enclosures as stated. 5 3. 5.

You have credit $15,029.50.
43.06.

Respectfully, yours,

CHAS. L. LANE,
Cashier.

I enclose for collection:

Enclosed you will find statement note, Chauncey T. Bowen, showing balance due bank $184.09. Have ordered home old note and will forward to you on receipt. You did not mention rate of interest—have reckoned same as last (15 %.)

This was all the evidence offered.

Whereupon the court rendered a decree for the plaintiff.

And afterwards, to wit, on the 4th day of November, A. D. 1876, within four days after said decree, the defendants filed their motion for a rehearing and new trial, which was as follows:

Motion for new trial.

Now, at this day come the defendants herein and make their motion for a rehearing and new trial, and for reasons assign the following:

1st. The decree and judgment is against the evidence.
2d. The decree and judgment is against the weight of the evidence.
3d. The decree and judgment is against the law.
4th. The decree and judgment is against the law and the evidence.

NOBLE & ORRICK,
Att'ys for Def'ts.

Which said motion the court on the 5th day of December, 1876, overruled, to which ruling and order of the court the defendants then and there excepted at the time.

They therefore pray the court to allow and sign this bill of exeptions and that the same may be signed and sealed and made a part of the record which is done this 30th day of January, A. D. 1877.

LOUIS GOTTSCHALK,
Judge.

95 STATE OF MISSOURI,
County of St. Louis, ss:

Jno. C. Orrick, agent and attorney of defendants herein, being duly sworn, makes oath and says that the appeal prayed for in the above-entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the court.

JNO. C. ORRICK.

Sworn to and subscribed before me this 2d day of February, A. D. 1877.

J. FRED. THORNTON, *clk.*

Know all men by these presents:

That we, J. W. Doane, as principal, and Robert U. Garrett and Jacob Furth, as sureties, are held and firmly bound unto Logan O. Swope, in the sum of five hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated at St. Louis, this twenty-ninth day of January, A. D. 1877. The condition of the above obligation is such, that whereas H. W. Leffingwell, J. W. Doane, The Atlas National Bank, of Boston & others, have appealed from the judgment rendered against them in favor of Logan O. Swope in the circuit court of St. Louis County, for :

Now, if said appellants shall prosecute their appeal, with due diligence to a decision in the St. Louis court of appeals and shall perform such judgment as shall be given by the St. Louis court of appeals, or such as the St. Louis court of appeals may direct the circuit court of St. Louis County to give, and if the judgment, or any part thereof, be affirmed, will comply with and perform the same, as far as it may be affirmed, and pay all damages and costs which may be awarded against them by the St. Louis court of appeals, then this obligation to be void, otherwise to remain in full force and effect.

J. W. DOANE. [SEAL.]
R. U. GARRETT. [SEAL.]
JACOB FURTH. [SEAL.]

Approved in open court Feb'y 2nd, '77.

J. FRED. THORNTON, *Clk.*

STATE OF MISSOURI,
County of St. Louis, ss:

I, J. Fred. Thornton, clerk of the circuit court of St. Louis County, do hereby certify the foregoing to be a true, full, and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remain on file and of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of

said court, at office, in the city of St. Louis, this day of A. D. 187 .

J. FRED. THORNTON, *Clerk.*

96 And afterwards, to wit, at a term of the St. Louis court of appeals begun and held at the city of St. Louis, on the first Monday in October, 1877, the following proceedings were had in said cause, to wit:

Assignment of errors.

In the St. Louis court of appeals, October term, 1877.

LOGAN O. SWOPE, RESPONDENT,
vs.
H. W. LEFFINGWELL, APPELLANTS.

And now comes the said appellants and say that in the record and proceedings of the court below in the above-entitled cause there is manifest error, and for error said appellants assign the following, to wit:

1. That said court admitted improper and illegal testimony offered by respondent.
2. That said court rejected proper and legal testimony offered by appellants.
5. That the decree was against the evidence.
6. That the decree was against law.
7. That the decree was against both law and evidence and against the law under the evidence.
8. That the decree was against the weight of evidence.
9. That the judgment was rendered in favor of the respondent when it should have been rendered for the appellants.

That said court overruled the motion for a new trial, made by appellants.

NOBLE & ORRICK,
Attorneys for Appellants.

97 And now comes the respondent and, for joinder in error, says there is no error in the record and proceedings of said court in said cause as assigned by said appellant.

E. F. SHERZER & ALEX. MARTIN,
Attorneys for Respondent.

And afterwards, at the same term of said court, the following judgment was rendered in said cause, to wit:

TUESDAY, *December 4th,* 1877.

LOGAN O. SWOPE, RESPONDENT,
vs.
HIRAM W. LEFFINGWELL, HENRY H. HONORÉ, Chauncey T. Bowen, John W. Doane, The Atlas National Bank of Boston, and persons unknown, claiming interest in three promissory notes, executed by Logan O. Swope, dated December 26, 1871, for $12,586.65, $11,946.65, and $11,306.65, due in one, two, and three years from date, appellants.

Appeal from St. Louis circuit court.

Now, again come the parties aforesaid, by their respective attorneys,

and the court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the said St. Louis circuit court be in all things affirmed and stand in full force and effect, and that the said respondent recover of the said appellants his costs and charges herein expended, and have execution therefor.

Opinion filed.

And afterward, at the same term of said court, the following further proceedings were had, to wit:

Order of appeal.

TUESDAY, *December* 18, 1877.

LOGAN O. SWOPE, RESPONDENT,
vs.
HIRAM W. LEFFINGWELL ET AL., APPELLANTS.

Now, at this day come the said appellants, by their attorneys, and file their affidavit for an appeal herein; and, on their motion, an appeal is granted them to the supreme court of the State of Missouri from the judgment herein rendered. They thereupon filed an appeal bond
98 in the penal sum of five hundred dollars, with Robert M. Wilson, R. W. Garrett, and R. L. Billingsbey as sureties; which bond is by the court approved.

Which affidavit and appeal bond are respectively in the words and figures following, to wit:

LOGAN O. SWOPE, RESP'T,
vs.
HIRAM W. LEFFINGWELL AND OTHERS APP'LT.

Before the St. Louis court of appeals. October term, 1877.

STATE OF MISSOURI, *ss:*

J. W. Doane, *of* one of the appellants in the above cause, being duly sworn, makes oath and says that the appeal prayed for in the above-entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the court.

JOHN W. DOANE.

Sworn to and subscribed before me, this 10th day of December, A. D. 1877.

[SEAL.] PHILIP A. HOYNE,
Commissioner of the State of Missouri, in Chicago, Illinois.

Bond.

Know all men by these presents that we, John W. Doane, as principal, and Robert M. Wilson and R. U. Garrett and R. S. Billingsbey, as sureties, are held and firmly bound unto Logan O. Swope in the sum

of five hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated at St. Louis this 8th day of December, A. D. 1877.

The condition of the above obligation is such that whereas Hiram W. Leffingwell and others have appealed from the judgment rendered against them and in favor of said Logan O. Swope in the St. Louis court of appeals—

Now, if said appellants shall prosecute their appeal with due diligence to a decision in the supreme court, and shall perform such judgment as shall be given by the supreme court, or such as the supreme court may direct the circuit court of St. Louis County to give,
99 and if the judgment, or any part thereof, be affirmed, will comply with and perform the same, as far as it may be affirmed, and pay all damages and costs which may be awarded against them by the supreme court, then this obligation to be void; otherwise to remain in full force and effect.

JOHN W. DOANE. [SEAL.]
ROBT. M. WILSON. [SEAL.]
R. U. GARRETT. [SEAL.]
R. L. BILLINGSBEY. [SEAL.]

Attest:
JOHN C. ORRICK.

Approved in open court, the 18th day of December, 1871.
Attest:

J. THORNBURGH, *Clerk.*

100 *Opinion of the St. Louis court of appeals.*

LOGAN O. SWOPE, RESP.,
vs.
HIRAM W. LEFFINGWELL ET AL., APP. } Appeal from the St. Louis circuit court.

OPINION OF THE COURT.

This is a bill to enjoin a sale of real estate in St. Louis, advertised to be sold by certain of the appellants, under a deed of trust. On the 26th of December, 1871, the respondent, Swope, bought of one Gordon the real estate in question, and to secure part of the purchase-money made his three negotiable promissory notes, known in this controversy as the Swope notes, in favor of Gordon. These notes were dated December 26, 1871, are payable respectively in one, two, and three years after date, and are in the aggregate for the sum of $35,839.95. They were secured by deed of trust on the real estate, which deed was recorded on the 22nd of January, 1872.

On the 25th day of May, 1872, the respondent sold the real estate to Henry H. Honoré, of Chicago, for $80,000, by deed of that date,
101 recorded on June 24, 1872, and by this deed the grantee, Honoré, as part of the consideration, assumed the payment of the Swope notes, and by a separate contract with respondent, agreed to pay them as they became due. On May 25, 1872, to secure three notes of that date, representing $18,500 of the purchase-money, Honoré executed a deed of trust on the property; and afterwards and before July, 1872, two more deeds of trust were given by Honoré upon the same property, the three given by him amounting to over $40,000. By transfer from

Gordon the Swope notes, secured by the deed of trust which was the first lien upon the real estate, because the property of a company finally known as the St. Louis Life Insurance Company.

The first two of the Swope notes not being paid at maturity, the insurance company, early in 1874, advertised the real estate for sale; and Honoré, who had informed the insurance company that he had assumed payment of the notes, procured from it the withdrawal of the advertisement by paying certain interest and costs, and giving a draft, which, however, was not honored. In the summer of 1874, Honoré had an
102 interview with Mr. Doane, of Chicago, who, besides his regular business, acted as agent for the Atlas National Bank of Boston, one of the appellants in this case, and who, for that bank, was accustomed to buy negotiable paper. As to precisely what happened at this interview there is some controversy, but it sufficiently appears that Honoré, who was well known to Doane, not as a man of pecuniary means, but as a perfectly reliable gentleman, stated to Doane that he (Honoré) had bought this real estate in St. Louis, subject to an incumbrance of about $30,000, and had agreed to have these Swope notes provided for; that the time was up, and the insurance company, the holder, would wait no longer; that two of the notes were then overdue and unpaid, and that he (Honoré) wanted to get the money paid over to the Bank of Commerce in New York, as he had agreed it should be about that time. Doane was assured that these notes were well secured, being a first lien on real estate worth over $100,000, and a letter and abstracts of title from an eminent lawyer of St. Louis, with a certificate as to the value of the property were shown to him.

103 Honoré knew that Doane was agent for the Atlas Bank, and wished to borrow the money on the Swope notes and put up his own note, as Doane states it. Doane declined to accede to this; but told Honoré that if he would get a Mr. Bowen, who, as Doane knew, had previously accommodated Honoré, to make his (Bowen's) note for an amount corresponding to the sum of the Swope notes and payable in four months, that he (Doane) would take such note in behalf of his bank, with the Swope notes as collateral. This was accepted, and Honoré procured Bowen's signature to a note for $32,805.97, dated about July 20, 1874, and maturing about October 3rd, 1874. This contained a power to sell collaterals, and the blank for the description of the collaterals was left, as the Swope notes were then in New York, or supposed to be there. It is a disputed point whether this note, thus signed by Bowen and known as the first Bowen or Bowen-Honoré note, was endorsed by Honoré or by Bowen. This Bowen note Doane took with him
104 to New York, telegraphing in the meantime to the Atlas Bank to honor his cheque in New York to the amount of "$32,805, for papers bought on your account." On July 20th, the day after the date of this telegram, the Atlas Bank telegraphed its correspondent in New York to pay the cheque of Doane. The Swope notes, however, were not in New York. Doane held no communication with the holder of the Swope notes. Honoré, however, on July 1st, had written from Chicago to the insurance company requesting it to have the Swope notes sent to New York, and to let him know at what place in New York they were payable.

Upon receipt of this letter, and about the 2d July, the insurance company drew its draft on Honoré for the sum total of the Swope notes, attaching to the drafts the notes and deed of trust, and handed them to its banker, the Bank of the State of Missouri, for transmission.

The latter, on July 3rd, sent the papers to the Bank of Commerce at

New York, saying it enclosed the draft on Honoré "for collection and credit," fixed with the Swope notes and deed of trust, the latter to be delivered on payment of draft. These enclosures were received
105 by the Bank of Commerce and the Honoré draft not being paid was protested and then returned to the Bank of Missouri.

When Doane reached New York, finding that the Swope notes had been sent back to St. Louis, he telegraphed Honoré to that effect, upon which Honoré wrote to the insurance company a letter of date Chicago, July 21st, in which he states he had made arrangements with a person who had gone to New York "to pay the Swope notes;" that this person was about to leave New York for Boston, and "says he will pay the notes if they are sent to the Atlas National Bank at that place." Upon receipt of this letter the insurance company wrote to the Bank of Missouri, enclosing the Honoré draft, which had been sent back from New York, and also a new draft for $80.31, representing interest and protest fees, and directed its banker to send these drafts to the Atlas Bank at Boston for collection. This letter, of date July 22d, contains the direction:

"Upon payment of these two drafts you will have the three
106 notes Logan O. Swope and the deed of trust, herewith attached, delivered to the party paying. In case the paper is not promptly paid, you will please have it retained in Boston a week or ten days." The Bank of Missouri accordingly sent to the Atlas Bank the two drafts, the Swope notes, and deed of trust, saying that the Honoré drafts were sent for collection, with the Swope notes and deed of trust securing the same, and directing the surrender of the notes, and deed of trust upon payment of the drafts. On the 25th July, and before Doane reached Boston, the Atlas Bank acknowledged receipt of these enclosures, and in the same letter said "Honoré not paid, we hold subject to your order." Doane soon after arrived at Boston and the result of an interview between him and the president of the Atlas Bank was that the latter handed his cashier the Bowen note, saying that Doane had given it to him for discount, and that the deed of trust and the Swope notes were "to go with the (Bowen) note as collateral," and that the blank in the Bowen note was to be filled with the description of
107 the collaterals. This is testified to by the cashier, who says he accordingly wrote the description in the Bowen note," and discounted the note in our ordinary course of business." Under directions of his president he further sent the amount of the larger draft on Honoré to the Bank of Commerce in New York to the credit of the Bank of Missouri.

The smaller draft, for $81.30 he returned to the Bank of Missouri, assigning the reason that his bank had no directions to pay it.

Shortly before the maturity of the first Bowen note, Honoré requested an extension of Doane, and accordingly a renewal note, signed by Bowen and endorsed by Honoré was sent to the Atlas Bank by Doane in a letter of date October 3, 1874. This second or renewal note fell due in January, 1875, and it was then renewed by a third note, made by Bowen and endorsed by Honoré. This last note being unpaid at maturity, the Swope notes were sold under the power to sell collaterals, and bidden in by the Atlas Bank, which proceeded to advertise the real estate
108 for sale. It was to enjoin this sale that the present action was brought. Prior to the beginning of this suit, the respondent, by virtue of a sale under the deed of trust, of date May 25, 1862, became the owner of the real estate, subject, as the appellants claim, to the deed of trust given to secure the Swope notes. The court below found that

the Swope notes had been paid by Honoré, and further that the appellant, the Atlas National Bank, was a corporation organized under the national banking act and acquired its title to the Swope notes and the deed of trust in violation of the acts of Congress.

A decree was entered accordingly and an appeal taken. In considing the question whether the notes made by the respondent and assumed by Honoré were paid, the distinction must be kept in mind between substantial acts of the persons concerned and the forms through which bankers and their bookkeepers go with a view of keeping their accounts. Thus it is of the utmost importance to settle in this case the relation which Doane bore to the Atlas
109 Bank. But this relation cannot be affected by the fact that that bank kept accounts with Doane and formally credited him with amounts on its books any more than the relations between the bank and Honoré can be affected by the fact that the bank did not enter upon its books the draft drawn by the insurance company upon Honoré.

Doane was, as he says, the agent of the Atlas Bank, and he so told Honoré at the time their arrangement was made. He acted as such throughout and had not, he says, a particle of interest in the transaction. The bank, it appears, placed implicit confidence in him and has never questioned his authority. Under the facts of this case what he did the bank did, and his knowledge was the knowledge of the Atlas Bank. For the bank Doane made the arrangement with Honoré, and it is clear that all the material features of Honoré's position were explained to Doane. But even independently of the legal presumption, the knowledge was brought home to the Atlas Bank that Honoré was the real debtor upon the Swope notes and the principal party in
110 the arrangement which Doane, as the bank's agent, had made for it. Honoré not only explained to Doane that he (Honoré) was obliged to meet the Swope notes, but as Doane testifies, explained that the holder would wait no longer.

The material point here is not that the arrangement was on the one hand to "carry" or on the other "to pay" the notes, about which there is much indicisive testimony, but that Doane understood that Honoré, with whom Doane made the transaction, was the debtor, virtually the obligor upon the Swope notes. This position Doane, when in Boston, had a full opportunity of explaining to his bank; and independently of this, the knowledge of the position was brought home to the bank, when with the deed of trust containing the assumption of payment by Honoré, the Swope notes, and the Honoré drafts before him, the cashier sat down to fill up the blank in the Bowen-Honoré note with the description of the collaterals. Again, the Honoré drafts directly drew attention to the position Honoré occupied. The principal draft was, as Doane says, the subject of conversation between him and the bank officers. Thus the Atlas Bank had not only constructive,
111 but actual knowledge that Honoré was the principal in the transaction and the debtor liable to pay the Swope notes. The facts show that Honoré was treated as the principal.

When Doane found at the Bank of Commerce that the Swope notes and deed of trust had been returned St. Louis, he telegraphed to Honoré that if he (Honoré) still wished to make the arrangement the notes must be sent to the Atlas Bank and that he (Doane) would carry out the negotiation there. This was after the Bowen note had been given. It was Honoré who was to make the arrangement and it was to be perfected between him and the Atlas Bank, in Boston. Honoré replied saying the notes had been sent to the bank, and there, after this new

communication and assent, the agreement was carried into execution, and the money advanced by the Atlas Bank, as Doane says, "under my arrangement with Honoré." So too, Lane, the cashier, says that he cannot state all the circumstances of the discount because the agreement for discount was "made by Mr. Doane, our agent." So too, in his letter of Dec. 19th, Doane says, "I hold the notes you speak of as
112 collateral security on a loan due January 14, 1875." This refers to the second note, which is produced and shown to have been endorsed by Honoré. It would require too much space to analyze the evidence bearing upon the question whether the first Bowen note was endorsed by Honoré. Judging both from antecedent probabilities and the direct testimony, the conclusion is clearly that it was; but in view of the facts above commented upon, and of the draft drawn by the holder of the Swope notes upon Honoré, as the debtor upon the Swope notes, the question as to whether Honoré was endorser on the first note is not a vital question. Why Honoré should have been upon the second Bowen note, unless upon the basis that he was at first and continued to be looked upon as the principal debtor, it is not easy to explain. It was Honoré who applied for the second extension, and with him that Doane made the arrangement for renewal, and the "loan" which was "due January 14, 1875," was the loan made "under my (Doane's) arrangement with Honoré," as renewed at Honoré's instance.

Doane knew that Bowen had no interest in the real estate, having been so told by Honoré. When, at the maturity of the second
113 Bowen note, Doane in the absence of Honoré notified Bowen, Bowen at once referred Doane to Honoré. Whether Bowen be called accommodation maker, whether he had a motive in connection with one of the mortgages in allowing his name to go on the notes, are not essential questions. The point is that Doane knew that Honoré and not Bowen was the principal and the person to whom, under the arrangement, the Atlas Bank was to advance the money. Without going further into details, it is sufficient to say that Done's testimony now, and acts at the time show that he fully understood the relation Bowen bore to the transaction. When the arrangement was made Bowen became liable, of course, to the bank on the Bowen-Honoré note; but this cannot obscure the nature of the real transaction, especially in view of the testimony of Doane and Bowen.

When asked why he did not directly advance the money upon the Swope notes, Doane says because the instructions of his bank were to buy no paper running more than four months. The Swope notes were not bankable paper. Two notes were overdue, the third had too long to run. It was, however, to the real estate that he looked; and
114 his testimony and conduct show, as does the figure which the Todd certificate cuts in the case, that he relied upon the property more than upon the Bowen-Honoré note, and would not have made the loan unless he had thought he was getting the security of the real estate.

This brings up the matter of intention, and the position upon which the appellants insist that the intention and purpose of Doane and the Atlas Bank was not to pay the notes but to buy them, that the design was to keep alive the security of the real estate, and, therefore, the appellants should not be precluded from availing themselves of that security. But if it is admitted, as it must be, that a person intending not to pay a note, but to buy and hold it, may pay it by his acts, in spite of his intention, then the intention cannot be the decisive test. A note, when paid by or on behalf of its maker, is discharged, whatever

the intention may be. The payment by a stranger is a different matter. But Honoré was here no stranger to the Swope notes, but liable to pay them, as if he had been the maker, and this both the
115 holder and the bank knew. As the bank had knowledge of all the material facts which in law constituted payment, it is not an excuse that they failed to observe or understand the legal operation of the facts. Here the acts of the holder and the acts of the person whom the holder knew to be the debtor were alike directed towards the result of accomplishing a payment. Under these circumstances, it is obvious that the case differs widely from those cited by the appellants.

Deacon vs. Stedhart, 2 Man. & G. 317, was an action by an endorser against an acceptor, and it was held that the acceptor was not discharged, there being no payment by or for him. A person had discounted the bill against the instructions of the holder, and wished to get it back again, and it was held that his act in paying the amount, in order to get possession of the bill, left the acceptor bound as before by his acceptance. In Pacific Bank vs. Mitchell, 9 M etc., 297, the plaintiff bank received the bill for collection from its correspondent, the N. E. Bank,
116 which had discounted the bill. It was held that the passing of the amount of the bill to the credit of the N. E. Bank by the plaintiff, when the bill came to maturity, was not such a payment as to discharge the acceptor. In Harbeck vs. Vanderbilt, 20 N. Y., 395, the rule declared is that, where the amount due upon a judgment is paid by one who is not a party to or bound by it, the judgment is extinguished, or not, according to the intention of the person paying. In what has been said above, the points of distinction between Dodge vs. Freedman's, etc., Company, 93 U. S. 379, and the case at bar have been made obvious. It is sufficient to observe that the analogy entirely fails between the situation of the purchaser in that case and the Atlas Bank here, the Supreme Court remarking: "There is no evidence that it (the bank) had knowledge of any obligation of Huntington to take up the notes, if any such existed, and there is no evidence that Huntington did anything about procuring an arrangement for their being taken up." So far as concerns the question now under discus-
117 sion, the case at bar is as if Honoré, and not Swope, had been the maker upon the Swope notes; whether, in an action against the acceptor, payment by the drawer can be pleaded as a discharge of the bill, or whether the holder may, in spite of such payment, recover the amount from the acceptor as on an unextinguished bill, has been heretofore a vexed question (Bacon vs. Searles, 1 H. Black, 88; Hemming vs. Brook, 1 Car. & M. 57; Byles on Bills, sec. 174; Pars. on Notes & Bills, 218, and note K; 2 Dan. Neg. Inst. sec. 1237); but payment by the drawer of an accom'odation bill is a complete extinguishment of the bill. Though the drawer is not on the face of the bill the debtor, yet when it is ascertained that he is the party ultimately liable, payment by him discharges the bill. This was decided in Lazarus vs. Cowrie, 2 Gal. & Dav., 487. The ultimate question there was whether the bill needed a stamp; but that depended directly upon the question whether the bill was paid. If paid it was no longer a negotiable instrument, and could not be put into circulation
118 without a fresh stamp. Lord Denman, said: "Now, it cannot be denied that if a bill be paid, when due, by the person ultimately liable up' it, it has done its work and is no longer a negotiable instrument. No person could sue upon it. No person remains liable upon it." * * * "But the drawer of an accom'odation bill is

in the same situation as the acceptor of a bill for value; he is the person ultimately liable, and his payment discharges the bill altogether."

So here, when the Atlas Bank knew that Honoré was the person ultimately liable, it knew that the payment of the Honoré draft was a discharge of the notes. The cashier discounted the Bowen note, and the president directed the cashier to send to New York, to the credit of the Missouri bank, the amount of the draft upon Honoré, which the cashier did. This would, in itself, have constituted a payment, if we are to apply to the facts the principles of the adjudged cases, but still more clearly did it become a payment from the circumstances under
119 which the holder received the money, and the manner in which he applied it. (Field vs. Carr, 5 Bing., 13; Burr vs. Smith, 21 Barb., 262; Wolff vs. Walter, 56 Mo., 292; Byles on Bills, 172.)

It was important to the Atlas Bank to enquire what title it was getting to the Swope notes, and from whom it was getting title. It is important for any purchaser, much more for him who buys negotiable paper, to make this enquiry. The title was in the insurance company, and this Doane knew, this the Atlas Bank was bound to know. Yet neither Doane nor the bank had, upon the bank's account, any communication with the insurance company, but left the whole matter to Honoré. It left Honoré to make the arrangement with the holder, and Honoré, if any effect is to be given to language used, not long after the event but contemporaneously, and to acts, not merely of his own, but of the holders, made *disposition* for the payment of the notes. Particular phrases ought not to be strongly insisted upon, but lan-
120 guage which concurs with acts must have its due weight. The conduct of Honoré seems to have impressed the insurance company with the understanding and belief that the Swope notes were to be paid, and not bought and held. It is true there was no restrictive endorsement upon the Swope notes but the words "without recourse in law or equity." But the testimony of Britton when analized is not convincing upon the point of an agreement to purchase, and does not harmonize with the acts of the parties at the time. It is hardly conceivable that if there was an understanding that the notes should be sold and held, not paid, Honoré could have used the emphatic and repeated expressions which he used indicative of his purpose to pay them. Britton is asked why he sent the notes to the Atlas Bank. He says, "I was instructed to do so by Mr. Honoré by letter of date July 29th, 1874." This letter expresses the surprise of Honoré at receiving a telegram from Britton saying that the Swope notes had not been
121 "paid." The truth undoubtedly is that neither Honoré nor Doane put fully before their own minds the effect that would follow a payment of the notes, or brought into juxtaposition the ideas of payment of the notes and the destruction of the security.

What is more important, however, than Honoré's expressions is the action of the insurance company, the holder, from whom, if from any one, the Atlas Bank must derive title. From Honoré it is obvious the Atlas Bank can get no title that will avail it in the present case. If Honoré had raised the money from persons in St. Louis, for instance, and "taken up" the Swope notes, it is clear that he could not have enforced the lien as against the respondent. (Kellogg vs. Schraake, 56 Mo., 136.) But if the notes would have been dead in his hands in such case it is not necessary to cite authorities to show that they can have no life in the hands of a person deriving title from him, as against a party with whom he had agreed to pay them. The question re-
122 curs, then, whether the Atlas Bank can derive title from the in-

surance company. The letter of Honoré of July 21st, is followed by the letter of the company of July 22nd, which enclosed for collection the draft drawn by the company on Honoré its debtor on the Swope notes, covering the amount of those notes and the small draft for interest and protest fees; and the Atlas Bank is required by the holder, upon payment of the drafts, to surrender notes and deed of trust. Evidently surrender to Honoré is intended, who had just written and telegraphed to the holder to send them to the Atlas Bank where he had made arrangements to have them paid. The Atlas Bank recognized the fact that the draft was to be paid by writing back "Honoré not paid." This seems to be the acceptance of the instructions, especially in connection with the subsequent letter of the Atlas Bank to the Bank of Missouri, in which the former states that the small draft is returned to the latter "as we have no orders to pay same."

Here are distinct acts of both parties, the holder on one hand,
123 the obligor of the paper on the other, showing a common understanding that the notes were to be paid. Against these acts how is it possible to array the intention of the appellants when such intention is but an inference arising from a conviction of what they should have done as compared with what they did.

It may be said it was implied in the arrangement between Doane and Honoré that the latter should get the insurance company's title transferred to the Atlas Bank; that Doane negotiated on the basis that this was to be done. But whether or not Doane relied on Honoré to do it, the fact is it was not done. Doane did nothing, and Honoré's acts were all in the direction of payment. As Lane, the cashier, says, the Bowen note was discounted. The money was thus advanced or lent to Honoré, and with it, under the understanding between Honoré and the insurance company, the draft covering the Swope notes was paid. When

the Swope notes were sold and purchased by the Atlas Bank, they
124 were sold by virtue of the power of sale contained in the third Bowen-Honoré note, and hence it would seem that the Atlas Bank did not claim to derive title except through Bowen or Honoré. But Bowen never had any interest in the Swope notes, and Honoré, as we have seen, could convey none to the Atlas Bank as against this respondent.

The third and last of the Swope notes had not reached maturity when the money was advanced by the Atlas Bank; and hence, it is claimed that this stands on a different footing from the other notes. But the deed of trust which was in possession of the Atlas Bank, if not before its cashier, when he filled the description of the securities, shows, that so far as the real estate was concerned, the failure to pay one of the notes at maturity caused all to become due. The obligation of Honoré was contained in that deed, and he was obliged to pay according to its terms. If the loan was made, as is claimed with especial reliance upon

the real property, this fact should have called attention to the
125 conditions upon which that security depended. As it was, the obligation was upon Honoré to pay, and he did pay the three notes.

The next question presented is as to the power of the Atlas Bank, being a bank incorporated under the national banking act, to acquire the notes which were secured by deed of trust upon the real estate. The court below saw fit to go into that question, and its action in sustaining its decision upon different and independent grounds, either of which would be sufficient, cannot be assigned as error. The form of the decree may be open to criticism, but it is substantially correct, and the

appellants cannot justly complain because two findings are embodied in it, either of which would justify the ultimate conclusion of the trial court.

The question as to the power of the Atlas Bank to purchase real estate securities, or acquire them at the time it made the discount, we do not consider an open question in this court. The same question
126 was directly passed upon by the supreme court of this State in Matthews vs. Skinker, 62 Mo., 329. The appellants attempt to make a distinction between that case and this by saying that the plaintiff there received no consideration for the note, secured by real estate which she gave. But the case does not show there was no considera: tion; and, if it did, the decision of the court is not placed on any such ground. It is further said that the respondent here is in the enjoyment of the land for the purchase of which these notes were given, and cannot now, in equity, be allowed to say that the act of the Atlas Bank releases him from his obligation. The general principle is, that where legal questions are presented for the decision of a court of equity, equity follows the law. In certain cases, however, equity refuses to give its aid to a suitor, whether plaintiff or defendant, as a court of common law would if it had jurisdiction, without imposing upon the suitor conditions which he ought to comply with, even though the subject
127 of the condition should be one which a chancellor would not otherwise enforce. Lord Cottenham, in Sturgis vs. Champneys, 5 Myl. & Cs., 102. This rests, however, upon the existence of an equitable right in the opposite party, as where a defendant impleaded by a plaintiff seeking aid against an over-assessment, is entitled to what is justly due. The maxim is of the same nature as that which requires a suitor in equity to come into court with clean hands, and exacts that there shall be no implication of wrong-doing.

Applying this principle, we find that in the case at bar, Honoré has no equity as against the respondent, and that the Atlas Bank stands in the place of Honoré. Again, there is here nothing which the respondent can fairly be called upon to do as a condition of receiving relief. On the basis of a decree in his favor, there is no virtual misconduct on his part requiring him to submit to terms. The question is simply whether the bank shall be permitted to sell the lands, and so make the respondent pay the debt which Honoré agreed to discharge. In
128 such case it is clear that equity must follow the law, and declare the legal rights of the parties as it finds them.

The decree of the court below is affirmed. All the judges concur.

C. S. HAYDEN.

STATE OF MISSOURI, *ss:*

I, Josiah Thornburgh, clerk of the Saint Louis court of appeals, certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remains of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at office in the city of St. Louis, this nineteenth day of December, A. D. eighteen hundred and seventy-seven.

SEAL OF THE ST. LOUIS COURT OF APPEALS.

J. THORNBURGH, *Clk.*

129 And afterwards, to wit, at the October term, 1880, of said supreme court, and on October 19th, 1880, there was filed in the

office of the clerk of said court an assignment of errors in said cause, which is in words and figures as follows, to wit:

In the supreme court of the State of Missouri, October term, 1880.

Assignment of errors.

LOGAN A. SWOPE, PLAINTIFF AND RESPONDENT,
vs.
H. W. LEFFINGWELL ET AL., DEFENDANTS AND appellants.

And now come the appellants, and say that in the record and proceedings in the St. Louis court of appeals in said cause, there is manifest error in this: that said court affirmed the judgment and decree of the St. Louis circuit court; and in this, that the said court did not reverse said decree and judgment of the St. Louis circuit court by reason and on account of each of the following errors committed by the court below on the trial of said cause:

130 1. That the court rejected proper and legal evidence offered by the appellants.

2. That said court decreed against the evidence.

3. That said court decreed against the law.

4. That the judgment and decree was rendered in favor of the respondent when it should have been rendered for the appellants.

5. That the said court overruled appellants' motion for a new trial and rehearing.

And appellants further say, that in each fact found and in each issue decided and in the judgment rendered, said court committed manifest error to the prejudice of these appellants.

NOBLE & ORRICK,
Appellants' Att'ys.

And now comes the respondent, and for joinder in error says there is no error in the record and proceedings of said St. Louis court of appeals, in said cause, as assigned by said appellants.

E. B. SHERZER,
Att'y for Pl'ff & Resp'd't.

131 (Endorsed:) Logan O. Swope, pl'ff & resp'd't, vs. H. W. Leffingwell et al., def'ts & app'l'nt. Assignments of errors. Filed October 19th, 1880. Henry W. Ewing, clerk.

And afterwards, to wit, at the same term and on October 25th, 1880, the following further proceeding were had in said cause, to wit:

LOGAN O. SWOPE, RESP.,
vs.
H. W. LEFFINGWELL ET AL., APP. } App. from St. Louis c't of app.

Come now the parties, by their attorneys, and after argument herein submit this cause to the court.

And aftewards, to wit, at the same term and on November 29th, 1880, the following further proceedings were had in said cause, to wit:

132 LOGAN O. SWOPE, RESPONDENT,
vs.
HIRAM W. LEFFINGWELL, HENRY H. HONORÉ, Chancey I. Bowen, John W. Doane, The Atlas National Bank of Boston, and persons unknown, claiming interest in the promissory notes executed by Logan O. Swope, dated Dec. 26th, 1871, for $12,586.65, $11,946.65, and $11,306.65 due in one, two, and three years from date, appellants.
} Appeal from St. Louis court of appeals.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment aforesaid in form aforesaid by the said St. Louis court of appeals rendered, be reversed, annulled, and for naught held and esteemed, and that the said appellants be restored to all things which they have lost by reason of the said judgment. It is further considered and adjudged by the court that the bill herein be dismissed, and that the said appellants recover against the said respondent their costs and charges herein expended, and have therefor execution.

(Opinion filed.)

133 Which said opinion is in words and figures as follows, to wit:

L. O. SWOPE, RESPONDENT,
vs.
H. W. LEFFINGWELL ET AL., APPELLANTS.

Opinion of the court.

On the 25th of May, 1872, Logan O. Swope was the owner of block 24 of Peter Lindell's second addition to the city of St. Louis, incumbered by a deed of trust by which said block was conveyed to Leffingwell to secure three promissory notes executed by said Swope to Robert C. Gorden, in the aggregate for the sum of $35,839.95. Each of said notes was dated December 26th, 1871; one for $12,586.65, payable December 26th, 1872; one for $11,946.65, payable December 26th, 1873, and the other for $11,306.65, payable December 26th, 1874. On said 25th day of May, 1872, Swope sold and conveyed the said block to Henry H. Honoré for $80,000, subject to said trust-deed to Leffingwell; and, by another agreement in writing of that date, Honoré obligated himself to Swope to pay off said notes secured by the deed of trust from Swope to Leffingwell. Honoré, on the 27th day of May, 1872, executed a deed of trust to Ed. B. Sherzer, conveying said block to him in trust to secure two notes executed by said Honoré to Andrew McKinley, one for $10,040, the other for $4,000, dated 27th day of May, 1872, and payable three years after their date, and one for $3,000 to Logan O. Swope of same date, and payable three years after its date. This deed of trust from Honoré was, by its terms, subject to two prior deeds of trust made by Honoré, and to Edwin Sherzer, dated May 25th, 1872, to secure a note of that date for $18,500, payable to Swope three years after its date; the other deed of same date to same trustee to secure a note of that date for $10,500, payable to Andrew McKinley one year after its date, who subsequently assigned it to C. T. Bowen.

134 The notes of Swope to Gordon, by assignment, became the property of the St. Louis Life Insurance Company. When the first two became due the holder caused the property to be advertised for sale under the deed of trust, but Honoré interposed, and by paying expenses and interest induced the holder to suspend proceedings that he might get some one to purchase the notes who would not force a sale of the property. Honoré then opened negotiations with John W. Doane, of Chicago, who was acting as agent of the Atlas National Bank, of Boston, in purchasing commercial and other paper. Doane at first declined to purchase the Swope notes, because he had instructions from the Atlas Bank to buy no paper running more than four months. It was finally arranged between them that Honoré was to get C. T. Bowen to execute his note for the aggregate amount of the Swope notes, payable three months after its date, for discount by the Atlas National Bank, and the Swope notes to be held by Doane as collateral security for its payment. This note of Bowen was dated in July, and fell due October 19th, 1874, before the maturity of the last of the three Swope notes. A. Britton, vice-president of the St. Louis Life Insurance Company, agreed with Honoré that the Swope notes and the deed of trust should be sent to New York with a view to the consummation of the arrangement with Doane, and through the National Bank of the State of Missouri the notes and deed of trust, with a draft on Honoré for the aggregate of the three notes, were sent to the Bank of Commerce, New York. The notes were indorsed, "Without recourse in law or equity; W. J. Lewis, president," as agreed by Britton and Honoré, and ordered by the executive committee of the board of directors of the life insurance company. Doane proceeded to New York with Bowen's note, having previously telegraphed the Atlas Bank to honor his draft for the aggregate amount of the notes, but on arriving in New York found that the Bank of Commerce had returned the notes, deed of trust, and draft to the bank at St. Louis, and informed
135 Honoré of the fact, and subsequently, by request of Doane and Honoré, they were sent to the Atlas Bank, which remitted the amount to the bank at St. Louis. On the 25th day of June, 1875, Logan O. Swope caused the block in controversy to be sold under Honoré's deed of trust to Sherzer, to secure his note for part of the purchase-money, and Swope purchased the property at the price of $22,000, and received a deed from Sherzer conveying the property to him. There were several renewals of the Bowen note to the Atlas Bank. Of the renewal notes Bowen was maker and Honoré payee and indorser. After the last renewal note became due the Atlas Bank took steps to have the property sold under the deed of trust for the payment of the Bowen note, of which it had become the purchaser at a sale made by Doane, who held them as collaterals to secure the Bowen note, with power to sell, etc.

This suit was instituted to enjoin and restrain said bank from proceeding with the sale of the block of land in controversy, alleging that the notes had all been paid. Swope obtained a decree in his favor in the circuit court, which, on appeal to the court of appeals, was affirmed, and defendants have prosecuted their appeal to this court.

The only question for consideration is, was the transaction between Honoré and Doane and the bank, a payment of the Swope notes? That it was the intention of Doane and Honoré that the former should purchase, and not pay off the notes, the evidence leaves no doubt. If Doane intended to pay off the notes, why his precaution to ascertain whether they were or not a first lien on the property, and why so solicit-

ous for the opinion of Mr. Albert Todd in regard to the title to the block? All the circumstances show that it was his purpose, as agent, to make an investment for the Atlas Bank, and his positive testimony is, that he purchased the notes. That this was also what was contemplated by Honoré, is shown by his letters to the St. Louis Life
136 Insurance Company, and his conversations with its vice-president, and the final agreement that they should be indorsed by the company, without recourse, and sent to New York with a view to the consummation of the arrangement made by Honoré with Doane. The same evidence conclusively shows that this was the understanding of the insurance company, the owner of the notes. If sent to New York for collection, why did they take the precaution to indorse them without recourse? Why indorse them at all? or, if indorsed, why not for collection, if payment of notes was expected? It had sent the notes and the draft on Honoré with directions to deliver them up to the payor of the draft, whether Honoré, or another; and there was no necessity, if nothing but the payment of the notes was in view, for any indorsement of the notes whatever, even for collection. But Mr. Britton's testimony, uncontradicted, is positive, that the notes were sent thus indorsed, first to New York and then to the Atlas Bank at Boston, under the agreement made between Honoré and the insurance company, through Britton and its executive board. This being so, what is there to make the transaction a payment, instead of a transfer and sale, of the notes?

It is contended that the draft for the aggregate amount of the notes was drawn on Honoré, who was bound for their payment, and, therefore, the payment of the draft was a payment of the notes. The cashier of the Atlas Bank testifies that the draft was not paid, but that an amount corresponding to the amount of the draft was paid, which was the sum total of the notes. He is not contradicted, although the transaction upon its face bears a different construction. This, however, is well explained by the witness, briefly, in answer to the following interrogatory: "Don't you think that the cashier of the St. Louis Bank, or any other third party, on reading your letter, would interpret the words 'accept for larger amount,' to mean that you had paid the Honoré
137 draft?" Answer. "Knowing nothing about other transactions, I think he would."

But suppose it be treated as a payment of the Honoré draft, does that, in view of all the facts, constitute payment of the notes? It is contended that Doane and the Atlas Bank had knowledge that, as betwixt him and Swope, the Swope notes were Honoré's debt, and he was primarily liable to pay it, and that, therefore, the payment of the Honoré draft was a payment of the notes. Conceding, for the argument, that from these facts, that would be a legal conclusion, the facts are not established by the evidence. Doane testifies, that all he knew of that matter was that Honoré's conveyance was taken subject to the encumbrance of the Swope notes. No witness testifies to the contrary. The conveyance, it is true, was subject to the encumbrance, and this was expressed in the deed, but that did not create a personal obligation on Honoré to pay those notes. This is well settled in this State, and we know of no text-book or adjudged case that holds otherwise. (Heim v. Vogel, 69, Mo. 529; Hoy v. Bramhall, 19 N. J., Eq., 75.)

The court of appeals, in its opinion, fell into an error in stating that the knowledge of his (Honoré) position, with reference to the notes, "was brought home to the bank, when with the deed of trust, containing the assumption of payment by Honoré of the Swope notes and the Honoré

draft before him, the cashier sat down to fill up the blank in the Bowen-Honoré note with the description of the collaterals." The only deed then before the cashier was the deed of trust from Swope to Leffingwell, to secure the notes in question, and it contained no reference whatever to Honoré's obligation to pay them, because, at its date, there had been no transaction between Swope and Honoré. The deed from Swope to Honoré was not before him, nor had he or Doane, or any officer of the bank, ever seen it, and if they had, it contained, as we have seen, no stipulation binding Honoré, personally, to pay the Swope-Gordon notes, so that the only information Doane or the
138 bank had was that communicated to Doane by Honoré, that his deed was subject to the encumbrance.

Conceding then that the Honoré draft was paid, as is contended, does that, under the circumstances, amount to payment of the notes? It was the plan adopted by the insurance company and Honoré to effect a sale of the notes; Honoré did not raise the money to pay it. His name was not on the first Bowen note. This is the positive testimony of the cashier of the bank, and the facts, that the proceeds of the discount of that note were placed to the credit of Doane on the books of the bank, and the name of Honoré nowhere occurred on the books, are strongly corroborative of his statement. It was a clumsy mode of accomplishing a very simple result; but the form is not to overshadow the substance. It was not a payment of the notes by Honoré, or any one for him, nor did either the holder of the notes, or Honoré, or Doane, or the bank, or any one connected with the transaction intend any such thing, or supposed that it had been done. Honoré's name in the draft is of no more sigificance, in the light thrown upon the transaction by all the antecedent circumstances, than if it had been drawn on John Doe or Richard Roe.

Considerable stress is laid upon letters written by Honoré to Britton, in one of which July 21st, 1874, he states that he "had made arrangements with a party to pay the Swope notes;" in another, July 29th, 1874, that he was surprised and annoyed by receipt of a telegram "saying these Swope notes had not been paid;" but in a letter of the 21st day of July he also says: "I had made arrangements with a party who left here for New York Sunday to pay the Swope notes, but have just received a telegram from him that the papers had all been returned to St. Louis. I have just telegraphed you as follows: 'Papers not in New York. Party who is to pay them gone to Boston, and wants them sent to Atlas National Bank, Boston. Please do so. Answer.'" Can there be any doubt that the reference in this letter is to Doane
139 and the arrangement between them, and that Mr. Britton well understood to what it referred? In pursuance of the understanding betwixt him and Honoré, and in compliance with the above telegram, he sent the papers to the Atlas Bank with the notes indorsed as we have seen. In Honoré's letter of the 29th day of July, he wrote: "Nearly two weeks ago I made arrangements with Mr. J. W. Doane, of this city, to take up the notes, but, when he arrived in New York, found that they had been returned to St. Louis, and sent me the following telegram: 'H. H. Honoré, etc. Papers have all been returned to St. Louis. Have them forwarded to Atlas National Bank, Boston, and I will carry out the contract.'" Again: "Mr. J. W. Doane is one of our largest grocers and a man of means and reliability, and he is also one of the largest buyers of securities we have, and his failure to take up the notes completely mystifies me. I still feel confident that Doane will take the paper." Evidently when he speaks of the "payment of the notes,"

or "taking them up," he does not mean payment of the notes, but payment of the amount to the insurance company under the arrangement with Doane for the sale of the notes.

It is alleged in the petition, that Bowen was jointly concerned with Honoré in the purchase of the block, and as between them, was equally bound to pay the Swope notes, and for this reason, it is contended, he executed his note for discount at the Atlas Bank. There is not a particle of testimony to that effect; but on the contrary, Bowen testifies positively that he had no interest whatever in that purchase, and that he executed that note in order to prevent a sale of the premises under the Swope deed of trust, to the sacrifice of his lien for the note assigned to him by McKinley. We think the conclusion, from all the facts of this case, irresistible, that it was not in the contemplation of Honoré, or Doane, or Bowen, or the bank, or the insurance company, the holder, that the notes were paid, or to be paid, by the transaction betwixt them.

140 The authorities are all to the effect that "if money be paid, not by one who is a party to a judgment and liable upon it, but by some third person, the judgment will be extinguished or not according to the intention of the party paying it." This was the language of Selden, J., in Harbeck v. Vanderbilt, 20 N. Y., 398. In that case there was a judgment against Jacob Vanderbilt and Harbeck and five others. An execution having been issued to the sheriff of Richmond County, is which Jacob Vanderbilt had abundant property to satisfy it, he, through his attorney, paid to plaintiffs in the execution his aliquot share, one-seventh, and for the remainder, delivered to the plaintiff in the judgment his promissory note, payable four months after date, to the order of and indorsed by Cornelius Vanderbilt, and simultaneously, the attorney took to himself an assignment of the judgment to be held by him as an indemnity to Cornelius Vanderbilt against his liability as indorser of the note, and the execution was then withdrawn. Before the note became due, Cornelius Vanderbilt had another execution issued to the sheriff of New York, who was proceeding to enforce its collection from the property of other of the defendants, who instituted suit to enjoin and restrain the sheriff, etc., alleging that the judgment had been satisfied. The trial court so held, but the court of appeals reversed the judgment. Opinions were delivered by Gray and Selden, JJ. The former observed that, "Every judgment purchased and paid for, is so far as the plaintiffs in it are concerned, paid; but if at the time of payment an assignment is made by the plaintiffs to a third party for the benefit of one with whose money or credit the payment is made, the judgment, although in one sense paid, is not satisfied, but remains subsisting and valid, until it has answered the purpose for which it was assigned." Jacob Vanderbilt was personally bound for the full amount of the judgment. This was known to the plaintiffs who obtained it. He paid one-seventh of the amount in cash, and gave his note, payable to the order of Cornelius

141 Vanderbilt, for the balance, which was accepted by the plaintiffs, and the execution was withdrawn, and the judgment assigned to the attorney for the benefit of C. Vanderbilt. So far as the plaintiffs in that judgment were concerned, it was paid by Jacob Vanderbilt, who was primarily liable, as maker of the note, and a defendant in the execution. Suppose, "instead, the arrangement had been that the plaintiffs in that judgment should draw on Jacob for the amount, to be paid by Cornelius Vanderbilt, who was then, for his security, to have an assignment of the judgment, would not this transaction have been

the same in substance? Instead of paying a draft on Jacob, he indorsed a note executed by him, and in that way became liable to pay the amount of that judgment. In equity, form yields to substance. The shadow follows the body, not body the shadow, and if equity would, on the facts of this case, permit Logan O. Swope to purchase this property, worth nearly $100,000, for less than one-fo'rth of its value, having previously received at least $10,000 on the sale to Honoré, and hold it discharged of the lien in question, it would work an injustice seldom, if ever, resulting from an application of the inflexible rules of the common law.

The case of White v. Knapp, 8 Paige Ch., 175, we regard as directly in point. Hinkley had executed a mortgage to a bank on property, which he afterward conveyed to Knapp, to whom he obliged himself to pay the incumbrance. Knapp subsequently executed a mortgage to White of the same property for $1,413.27. In June, 1836, the bank demanded of Hinkley the balance due on his mortgage, and not having the money, he induced the son of the defendant, Thomas, to let him have $380 of his father's money to pay off said mortgage, promising that Thomas' father should have the same security for the money that the bank then had, which arrangement the father, when informed of it, sanctioned. Hinkley, the debtor, then went to the bank with the money thus obtained, together with a further sum of his own, and took from the bank an assignment of the bond and mortgage to
142 Thomas, to whom they were afterword delivered. The chancellor, Walworth, said: "Upon the facts presented in this case I should have no doubt that the defendant, Thomas, was entitled to hold the bond and mortgage as security for the money thus advanced by his son, with the interest thereon, even if the subsequent mortgage by Knapp to the complainant had been given for money advanced at the time, and not merely to secure an antecedent debt."

Two respectable courts having decided this cause against the defendant, we have given it the consideration which that fact and the amount and principle involved demanded, and been forced by the evidence to the conclusion that the Atlas Bank has, both in law and equity, a right to the lien it claims upon the property in question, and that the judgment should be reversed and the bill dismissed, and, all concurring, it is so adjudged and ordered.

JOHN W. HENRY.

And afterwards, to wit, at the same term, and on December 9th, 1880, the following further proceedings were had, to wit:

LOGAN O. SWOPE, RESP.,
vs.
H. W. LEFFINGWELL ET AL., APP'L'TS. } Appeal from St. Louis court of appeals.

Comes now the respondent, by attorney, and files a motion for a rehearing of this cause.

Which said motion is in words and figures as follows, to wit:

143 *Respondent's motion for a rehearing.*

In the supreme court of the State of Missouri, October term, 1880.

LOGAN O. SWOPE, RESPONDENT,
vs.
HIRAM W. LEFFINGWELL ET AL., APP'L'TS. } No. 56.

Now comes the respondent and respectfully moves this honorable court for a rehearing in the above-entitled cause, and for grounds thereof submits the following:

That questions decisive of the case, and duly submitted by counsel, have been inadvertently overlooked by the court. That the decision herein is in conflict with controlling decisions of this court, which, through inadvertence of counsel, had not been called to its attention, and that the court has inadvertently erred in its statement of what the record herein contains and discloses.

We purpose in a brief, to be subsequently filed by leave of the court, to specifically point out the errors complained of, and to show the papers on which founded, and ask leave of court (the matter being of such importance and the record so voluminous) hereafter, in such
144 time as it may be pleased to grant, to file additional grounds and brief in support of this motion, and ask for said additional time.

E. Z. SHERZER,
Respondent's Att'y.

(Endorsed:) Logan O. Swope, resp., vs. Hiram Leffingwell et al., app'l'ts. Motion for rehearing by respondents. Filed Dec. 9th, 1880. H. W. Ewing, cl'k, by Chas. G. Guenther, D. C.

145 And afterwards, to wit, at the same term, and on December 13, 1880, the following further proceedings were had in said cause, to wit:

LOGAN O. SWOPE, RESP.,
vs.
H. W. LEFFINGWELL ET AL., APP'L'TS. } Appeal from St. Louis ct. of appeals.

Ordered by the court, that the respondent have leave to file briefs in support of motion for rehearing, on or before the 4th day of January next.

And afterwards, to wit, at the same term, and on the 10th day of January, 1881, the following further proceedings were had in said cause, to wit:

LOGAN O. SWOPE, RESP.,
vs.
HIRAM W. LEFFINGWELL ET AL., APPELlants. } Appeal from St. Louis court of appeals.

Now, at this day, the court having fully considered and understood the motion of said respondent for a rehearing of this cause, heretofore filed herein, doth order that the same be overruled. (Opinion filed;) which said opinion is in words and figures following, to wit:

146 L. O. SWOPE, RESP.,
vs.
H. W. LEFFINGWELL ET AL., APP. } On motion for rehearing.

In the view we take of this case, it does not matter whether Honoré, by stipulation in the deed from Swope to him, assumed the payment of

the notes in question or not. The authorities cited in the opinion fully sustain the position, that if the parties to the transaction intended a purchase and not a payment of the notes, it did not amount to a payment, although Honoré was personally liable to pay them, and the other parties were aware of that fact. That purchase, and not payment, was in the contemplation of all the parties, we still think clearly established by the evidence. Whether the trust property is worth more or less than this court found from the evidence is of no consequence, because the right of the Atlas Bank to resort to the deed of trust executed by Swope for satisfaction of the notes is the same whether the property is worth $100,000 or only $10,000. Counsel allege that three contradictory statements, as deductions from the testimoney, occur in the opinion delivered, viz, first, that Doane purchased the notes of the insurance company; second, that Bowen held them as collateral to his own debt or note; third, that Doane held them as collateral to secure the Bowen note. The first statement is not to be found in the opinion; and while the second does occur, the context clearly shows that, by clerical mistake, the name of "Bowen" was written, when that of Doane was intended, and it is surprising that counsel gravely urge such a mistake as a reason why a new hearing should be granted.

With regard to the right of the Atlas Bank, under the national banking act, to buy this paper, it is only necessary to say that the judgment of this court in the case of Matthews v. Skinker, 62 Mo.,
329, holding that a national bank could not deal in such securi-
147 ties, or avail itself of the deed of trust executed to secure them, was reversed by the Supreme Court of the United States; and we may add that Matthews v. Skinker was overruled by this court before the judgment was reversed by the Supreme Court of the United States. Thornton v. The National Exchange Bank, 71 Mo., 221.

Nothing has been alleged which raises a doubt in our minds that the opinion heretofore delivered is in accord with well established principles of equity, or that our conclusions were not warranted by the evidence. The motion is overruled. All concur.

JOHN W. HENRY.

148 And afterwards, to wit, at the same term, and on the 27th day of January, 1881, the following further proceedings were had in said cause, to wit:

LOGAN O. SWOPE, RESPONDENT,
vs.
H. W. LEFFINGWELL, ET AL., APPELLANTS. } Appeal from St. Louis ct. of appeals.

Now, again comes the said respondent and files a writ of error from the Supreme Court of the United States in this cause, which is allowed by the Chief Justice.

Citation filed.

Bond filed, which is approved by the Chief Justice.

Which said bond is in words and figures following, to wit:

149 Know all men by these presents, that we, Logan Swope, as
principal, and Thomas H. Swope are held and firmly bound unto Hiram W. Leffingwell, Chauncy J. Bowen, Henry Honoré, John W. Doane, The Atlas National Bank of Boston, in the full and just sum of five thousand dollars ($5,000) to be paid to the said Hiram W. Leffingwell, Chauncy J. Bowen, Henry Honoré, John W. Doane, and the Atlas Na-

tional Bank of Boston, heirs, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this 27th day of January, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas, lately, at the October term, 1880, of the supreme court of the State of Missouri, in a suit depending in said court between said Logan O. Swope, plaintiff, and Hiram W. Leffingwell, Chauncy J. Bowen,
Henry Honoré, John W. Doane, and The Atlas National Bank of
150 Boston, defendants, was rendered against the said plaintiff, and the said plaintiff, Logan O. Swope, having obtained a writ of error of the said Supreme Court of the United States to reverse the judgment and decree in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next.

Now, the condition of the above obligation is such that if the said Logan O. Swope, plaintiff, shall prosecute said writ of error to effect and answer all damages and costs, if he fail to make good his plea, then the above allegation to be void, else to remain in full force and virtue.

L. O. SWOPE, [SEAL.]
By T. H. SWOPE,
Att'y in Fact.
THOMAS H. SWOPE. [SEAL.]

Approved by—

T. A. SHERWOOD,
C. J. S. C., W.

(Endorsed:) Swope vs. Leffingwell et. al. Bond, $5,000.00. Filed 27 day of January, 1881. Henry W. Ewing, clerk, by Chas. G. Guenther, D. C.

151 STATE OF MISSOURI, *ss:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings had in the above-entitled cause, as fully as the same remain of record and on file in my office.

In testimony whereof I hereto set my hand and affix the seal of said court, at office, in the city of Jefferson, this 8th day of September, A. D. 1881.

[SEAL.]

HENRY W. EWING,
Clerk Supreme Court of Missouri.

(Indorsement on cover:) No. 1143. Logan O. Swope, plaintiff in error, vs. Hiram W. Leffingwell, Henry H. Honoré, Chauncy J. Bowen, Jno. W. Doane, & The Atlas National Bank of Boston. Missouri supreme court. Filed 14th November, 1881.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

LOGAN H. SWOOPE
vs.
LEFFINGWELL *et al.* } No. 1,143.

This is a writ of error to the Supreme Court of the State of Missouri.

The defendants in error now move the Court to dismiss the writ of error on the ground that this Court has no jurisdiction, there being no federal question involved in the decision of the case; uniting here with a motion to affirm, on the ground that, although the record may show that the Court has jurisdiction, it is manifest that the writ has been taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

P. PHILLIPS,
For defts. in error.

25th November, 1881.

To... ....., Esq.,

Take notice that the above notice will be submitted on the 2d Monday in January next, on the grounds set forth in the accompanying briet.

P. PHILLIPS,
For defts. in error.

gan H. Swoope, by his petition filed in the Circuit Court of St. Louis County, represented that he had executed certain promissory notes therein described, and to secure payment thereof he had made to H. F. Leffingwell a deed of trust on certain real estate.

The petition sets forth the transactions between the parties, by which it is claimed that these notes had been fully satisfied so far as to relieve the petitioner from liability, and to free the property contained in the trust-deed.

Notwithstanding this, it is averred that the defendants, Honoré, Brown, Doane, The Atlas National Bank, and Leffingwell, refuse to enter satisfaction of said deed of trust, and insist that the notes are still valid and subsisting demands against petitioner.

The prayer is, that the defendants be enjoined from proceeding to enforce the deed of trust, &c., &c.

On the hearing—to wit: 9 November, 1876—a judgment was rendered for petitioner as prayed for.

In the opinion filed by the Judge it is said, *inter alia*, that "the Atlas National Bank had acquired title to the notes held by it, and to the deed of trust, in violation of the Act of Congress."

On appeal, this judgment was affirmed by the St. Louis Court of Appeals, on 4 December, 1877, where it was said: "The question as to the power of the Bank to acquire real estate securities at the time it made the discount we do not consider an open question, as it was directly passed upon by the Supreme Court of this State in *Matthews* vs. *Skinker*, 62 Mo., 329.

The cause was then carried to the Supreme Court of the State, where, on the 29 November, 1880, the judgment of the St. Louis Court of Appeals was reversed, and the bill dismissed with costs.

In the opinion then filed the Court say: "The only question for our consideration is, was the transaction between Honoré and Doane and the Bank a payment of the Swoope notes?"

It thus concludes: "Two respectable courts having decided this case against defendants, we have given it the consideration which the facts and the amount and the principle involved demanded, and have been forced by the evidence to the conclusion that the Atlas Bank has, both in law and equity, a right to the lien it claims upon the property in question."

Swoope filed his petition for a rehearing of the cause, in which it is urged that the decision was in conflict with the controlling adjudications of the Court, which, through inadvertence of counsel, had not been called to its attention.

Leave was granted to file briefs in support of the motion, and on 10 January, 1881, it was overruled.

In the opinion filed on this application the Court say: "With regard to the right of the Atlas Bank to buy the paper, it is only necessary to say that the judgment of the Court in the case of *Matthews* vs. *Skinker*, 62 Mo., 329, holding that a national bank could not deal in such securities, or avail itself of the deed of trust executed to secure them, was reversed by the Supreme Court United States. And we may add that *Matthews* vs. *Skinker* was overruled by this Court before the judgment was reversed by the Supreme Court of the United States. *Thornton* vs. *National Bank*, 71 Mo., 221."

"Nothing," say the Court, "has been alleged which raises a doubt in our minds that the opinion heretofore delivered is in accordance with well-established principles of equity, or that our conclusions were not warranted by the evidence."

Jurisdiction.

In the cases of the *National Bank* vs. *Matthews*, 98 U. S., 621, and *National Bank* vs. *Whitney*, 103 U. S., 99, the judgments of the State courts denied to the banks a right which they claimed under acts of Congress. This conferred the jurisdiction on this court to determine whether those judgments were correct.

These judgments were reversed, the court holding in both cases that the bank acquired by discount a good title to the note and to the securety of the deed of trust, and that if even incompetent by its charter to take title to real estate, a conveyance to it was voidable only, and the sovereign alone can object.

In the case before us the claim for jurisdiction is that the court has decided against the construction set up by the plaintiff in error of the act of Congress. But he in no wise claims title under that act, nor does the decision in favor of the bank violate any right, title or privilege secured to him by the Constitution or laws of the United States.

But assuming that the record does present a federal question, which would preclude the granting of the motion to dismiss, it is, nevertheless, a question so well settled by the decisions referred to that the court will not hesitate to affirm the judgment to which the present writ of error is directed.

The plaintiff in error, in suing out this writ, can not even plead ignorance, for the decisions on this subject were pointed out to him by the court, whose judgment he seeks now to reverse. These decisions show that the question now urged has been so well settled that they require no further argument.

Respectfully submitted.

P. PHILLIPS,
for Defendant in Error.

JAN 9 1882

IN THE

UNITED STATES SUPREME COURT.

SWOOPE
vs.
LEFFINGWELL AND NATIONAL BANK, BOSTON. } No, 1,143.

Brief of P. Phillips in Reply.

The plaintiff in error maintains the jurisdiction on the ground that "he claimed that the contract made with defendant in error, by which it acquired the security, was prohibited by act of Congress."

That by virtue of said act he was, in respect to said property, exonerated from the claim made, and had *immunity* therefrom.

That the Supreme Court of the State having denied this right of immunity, the jurisdiction attaches.

This court has twice decided that the non-observance of the restrictions imposed by the act on National Banks cannot be called in question by those dealing with them; that it is for the government alone to take such action thereon as it may think fit.

If, then, the plaintiff had no right to raise the question, he had no "immunity" which can be set up as the ground of jurisdiction.

See 98 U. S., 621;
103 " 99.

It, however, it should be held (these decisions notwithstanding) that the mere *claim* for immunity under the act of Congress constitutes a jurisdictional question, then we invoke the application of the rule "where the question on which the jurisdiction depends is so frivolous as not to need further argument."

In such cases the court will affirm the judgment.

In reply to the motion to affirm, it is maintained that, if the jurisdiction attaches, the court "will pass the cause to a hearing on the merits," in accordance with the decision in *Railroad* vs. *Maryland*, 20 Wall., 643.

This case supports the proposition. It was decided at the October Term, 1874. And as we understand it the rule adopted 8 May, 1876, was intended to meet the inconveniences and delays occasioned by it. The express language of the rule is, that with the motion to dismiss, there may be united "a motion to affirm on the ground that, although the record may show *that this court has jurisdiction*, it is manifest the writ was taken for delay only, or that the question on which the jurisdiction depends is so *frivolous* as not to need further argument.

P. PHILLIPS,
For Defendant in Error.

(No. 1143.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

LOGAN O. SWOPE,
PLAINTIFF IN ERROR,

vs.

HIRAM W. LEFFINGWELL,
THE ATLAS NATIONAL BANK OF BOSTON ET AL.,
DEFENDANTS IN ERROR.

BRIEF OF PLANTIFF IN ERROR ON MOTION TO DISMISS, ETC.

The Atlas National Bank is practically the real, and substantially the only Defendant in Error to the Record.

It was proceeding under Missouri deed of trust to sell certain real property owned by Plaintiff in Error, securing certain of his notes, to enjoin and restrain which, Plaintiff in Error filed his bill, alleging, among other things, that the bank acquired such notes after maturity from one who had for value assumed their payment, and with knowledge of such assumption, and that, under the act creating it, it was prohibited from acquiring such security.

The Court below decreed for Plaintiff in Error on both grounds, and enjoined the sale, which decision was affirmed in the St. Louis Court of Appeals, but reversed in the State Supreme Court and bill dismissed, from which decision the present writ of error is prosecuted.

JURISDICTION.

The record discloses that Plaintiff in Error claimed in the State court that the contract made by Defendant in Error, by which it acquired the security, was prohibited by Act of Congress, and of no force and effect, and the decision of the Supreme Court was against this claim.

This confers jurisdiction.

Railroads v. Richmond, 15 Wall. p. 3–7.

The petition sets out the act, and alleges that the claim made is in contravention thereof; that under and by virtue of the act, the property of Plaintiff in Error is exempt from the claim sought to be enforced against it. In other words, that under and by virtue thereof, Plaintiff in Error, in respect to said property, was exonerated from the claim made, and had immunity therefrom.

The Supreme Court of the State denied this right of immunity, and jurisdiction attaches.

The Supreme Court of the State of Missouri must necessarily have decided against this claim of immunity; otherwise, notwithstanding other grounds, it must have affirmed the decree below enjoining the sale.

I.

The court having decided that jurisdiction attaches, will pass the cause to a hearing on the merits.

Murdock v. City of Memphis, 20 Wall, p. 590, 636.
Railroad Co. v. Maryland, Id. p. 645.

(*a.*) And this, even though it may have a "very clear conviction that decision of State Court was correct."

Pennywit v. Eaton, 15 Wall. p. 380, 381.

(*b.*) It is not held otherwise in

Whitney v. Cook, 99 U. S., p. 607.

II.

We might with propriety refuse to discuss matters pertinent only to a review of the record on the merits.

At the proper time, we propose to show the case at bar distinguishable from all other cases decided under the Act from which we claim immunity flows, and that the question presented here is a new one.

In the case at bar, Plaintiff in Error did not obtain money from the bank. He was not the beneficiary of its favor—on the contrary, as the record discloses, the victim of its rapacity and wanton disregard of the prohibition imposed by the Act.

The Supreme Court of the State of Missouri held that the bank bought the security direct—that it intended so to do. To its judicial mind, it was not by way of discount or of loan that it acquired the same.

The security (realty) was the object sought. From which contract made and transaction had, under prohibition of the Act, Plaintiff in Error, an innocent party, suffered injury.

Every decision made, it is conceived, is to be construed with reference to the facts peculiar to the cause; and whatever statements made or decisions of this court pointed out in the opinion of the Supreme Court of the State of Missouri, it is sufficient to say that its decision is here for re-examination and review.

All of which is respectfully submitted,

E. B. SHERZER,

For Plaintiff in Error.

15 Otto 4

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 178.

ANDREW J. DAVIS AND CHARLES L. CLARK, PLAINTIFFS IN ERROR,

vs.

SARAH J. FREDERICKS AND WELLINGTON A. FREDERICKS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED APRIL 19, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 178.

ANDREW J. DAVIS AND CHARLES L. CLARK, PLAINTIFFS IN ERROR,

vs.

SARAH J. FREDERICKS AND WELLINGTON A. FREDERICKS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

INDEX.

	Original.	Print.
Amended complaint	1	1
Amended answer	4	2
Replication	8	3
Complaint	10	4
Answer	13	5
Replication	19	7
Order of court consolidating cases	24	9
Statement on appeal	24	9
Testimony of Sarah J. Fredericks, plaintiff	25	10
Sole tradership (declaration of intention)	25	10
Testimony of Charles L. Clark, sheriff	31	12
Sheriff's return of writ of attachment	32	12
Testimony of A. J. Davis	34	13
cross-examination	35	14
C. L. Clark (recalled)	38	15
W. V. Ryan	39	15
C. W. Haskins	40	15
Ellison	40	16
J. W. Grannis	42	16
Mike Lane	43	16
J. V. Ryan	43	17
Watts	44	17
Mrs. Fredericks, S. J. (recalled)	44	17
Deed from W. H. Drew to S. J. Fredericks	46	18
Complaint, S. J. Fredericks vs. Davis and Gilbert	49	18
Complaint, A. J. Davis vs. W. A. Fredericks	53	20
Writ of attachment, Davis vs. W. A. Fredericks	60	23
Amended answer, Fredericks vs. Davis and Gilbert	62	23
Demurrer	70	26
Answer to cross-complaint, S. J. Fredericks vs. Davis et al	71	26
Affidavit of Sarah J. Fredericks	72	27
Notice of S. J. Fredericks to C. L. Clark, sheriff	73	27
Affidavit of ownership of S. J. Fredericks	74	28

5. That said defendants do now wrongfully and unlawfully withh and detain possession of said property, goods and chattels from possession of this plaintiff, to her damage in the sum of two hund dollars.

Wherefore this plaintiff, Sarah J. Fredericks, demands judgm against said defendants—

1st. First, for the recovery of the possession of said property, goo and chattels and for the sum of two thousand two hundred and thirt dollars ($2,213.00), the value thereof, in case delivery cannot be had

2. Second, for two hundred dollars damages and for costs of suit.

(Signed) JOHNSTON & TOOLE, AND
4 JOHN H. SHOBER,
Plaintiffs' Attorneys.

MONTANA TERRITORY,
Gallatin County, ss:

Sarah J. Fredericks, being duly sworn, says she is one of the plai iffs in the above entitled action, and that she has heard read the fo going amended complaint, and knows the contents thereof, and th the same is true of her own knowledge.

(Signed) SARAH J. FREDERICKS.

Subscribed and sworn to before me this 3rd day of May, A. D. 18

JAMES G. DOW,
Notary Public.

And the said defendant having filed in said cause his amended a swer thereto, which answer is in words and figures following, to wit

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

5 Now come the above named defendants, by their attorne and for answer to the amended complaint of the plaintiffs fil herein deny each and every allegation in the said complaint containe Defendants deny that on the 8th day of March, A. D. 1875, or at a other time, at the county of Gallatin and Territory of Montana, or el where, the said plaintiff Sarah J. Frederick' was the sole or exclusi owner or possessor in her own right, as sole trader or otherwise, of t goods or chattels set out and attempted to be described in plaintif said complaint.

Deny that the defendants, or either of them, ever at any time wron fully or unlawfully took said or any goods or chattels from the poss sion of said plaintiff Sarah J. Fredericks.

Deny that before the commencement of this suit the said plaintiff d manded of defendants the possession of said goods or chattels, or a thereof.

Deny that said plaintiff was or is entitled to the possession of sa goods or chattels or any thereof.

Deny that defendants do now wrongfully or unlawfully withhold detain possession of said property, goods, or chattels from the po session of the said plaintiff to her damage in the sum
6 two hundred dollars, or in any other sum.

The defendants for further answer aver that on or about the 8th day of March, A. D. 1875, the said defendant Charles L. Clark was sheriff of Gallatin County, in said Territory; and that on or about the date last aforesaid, as such sheriff, the said defendant Clark, under and by virtue of two several writs of attachment issued out of the office of the clerk of the district court in said county of Gallatin, one in a case then pending in said court, wherein Andrew J. Davis was plaintiff and W. A. Fredericks and W. H. Drew were defendants, and one in a case therein pending wherein the said Andrew J. Davis was plaintiff and Wellington A. Fredericks was defendant, said writs being dated the 6th day of March, 1875, did seize and levy upon as the property of Wellington A. Fredericks, the defendant in said writs of attachment and one of the plaintiffs herein, certain goods and chattels, consisting of flour and lumber, a portion of which is attempted to be described in plaintiffs' said amended complaint, but a particular description of said property seized by said defendant as sheriff as aforesaid is attached to and endorsed on the writs of attachment aforesaid, reference being had thereto.

7 Defendants further aver that the goods and chattels so levied upon as aforesaid at the time aforesaid under and by virtue of the writs aforesaid were at the time of said levy the property of the said Wellington A. Fredericks, one of the plaintiffs to this action; and that if the said plaintiff Sarah J. Fredericks ever at any time had possession of any of said goods and chattels or of the goods and chattels set forth in plaintiff's said amended complaint, the defendants aver that such possession was a fraudulent one, and that the same were held by her for said Fredericks under cover to conceal the same from the creditors of the said Wellington A. Fredericks and to defraud the said defendant Andrew J. Davis and other creditors of said Frederick' and prevent the collection of just debts of said Davis and others against W. A. Fredericks.

Defendants deny that the said plaintiff Sarah J. Fredericks has sustained any damage whatever by reason of the acts of these defendants; and having fully answered the defendants ask to be dismissed with their costs herein expended.

T. R. EDWARDS AND
SAMUEL WORD,
Attorneys for Defendants.

8 TERRITORY OF MONTANA,
County of Lewis and Clarke, ss:

Andrew J. Davis, being first duly sworn, on his oath says that he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the facts therein stated are true of his own knowledge.

ANDREW J. DAVIS.

Subscribed and sworn to before me this May 26, A. D. 1876.
[SEAL OF 3D JUD. DIS. COURT.] ALEX. H. BEATTIE,
Clerk of the 3rd Jud. Dist. Court, M. T.,
By JNO. N. HELDT,
Deputy Clerk.

That thereafter the said plaintiff filed a replication to said answer, which is in the words & figures following:

In 1st judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

9 Now come the defendants and for replication to defendants' answer herein—

1st. Deny that at the time of the levy of the attachment herein, or at any other time, Wellington A. Fredericks was the owner of, or had any interest in, any of the property mentioned in plaintiffs' complaint herein.

Deny that any of said property in plaintiffs' complaint mentioned was ever held by Sarah J. Fredericks for the purpose of covering up the same from defendant A. J. Davis or any creditor of Wellington A. Fredericks.

3. Deny that said property was ever held by said Sarah J. Fredericks in fraud of any creditors of said Wellington A. Fredericks or to hinder or delay any creditors of said Wellington A. Fredericks.

Wherefore plaintiff demands judgment as in her complaint herein prayed for.

JOHNSTON & TOOLE,
J. H. SHOBER & SANDERS & CULLEN,
Att'ys for Plaintiffs.

MONTANA TERRITORY,
Gallatin County, ss:

Sarah J. Fredericks, being duly sworn, says she is plaintiff in the above-entitled action, and that she has heard read the foregoing replication and knows the contents thereof, and that the same is true of
10 her own knowledge except as to the matters therein stated on information and belief, and as to those matters she believes it to be true.

(Signed) SARAH J. FREDERICKS.

Subscribed and sworn to before me this 27th day of October, A. D. 1876.

J. H. SHOBER,
Notary Public, M. T.

And the said Sarah J. Fredericks and Wellington A. Fredericks having commenced their suit in this court against Charles L. Clark and Andrew J. Davis by filing their complaint, the said complaint was in the words and figures following, to wit:

In first judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

The plaintiff Sarah J. Fredericks, for complaint against the above-named defendants, states: That on the 15th day of April, A. D. 1875, she was, and for a long time previous thereto had been, and
11 now is, a married woman and the wife of Wellington A. Fredericks, her coplaintiff above named.

2. That on the 15th day of April, A. D. 1875, at the county of Gallatin and Territory of Montana, this plaintiff Sarah J. Fredericks was the sole and exclusive owner and possessor in her own right, as sole trader, of the following goods and chattels, to wit: Fifteen (15) sacks choice XXX (trible X) flour of the Willow Creek flouring mill make and brand, and three thousand five hundred (3,500) shingles, and four thousand five hundred feet of dry white-pine lumber, being her separate and sole property.

That said flour was of the value of one hundred and twelve dollars and fifty cents; that said shingles was of the value of twenty dollars, and said lumber of the value of one hundred and eighty dollars.

3. That the defendants, on the 15th day of April, A. D. 1875, while this plaintiff was the sole and exclusive owner of said property, at the same county of Gallatin and Territory of Montana, without this plaintiff's consent, did wrongfully and unlawfully take said goods and chattels from the possession of this plaintiff Sarah J. Fredericks.

4. That before the commencement of this action, to wit, on the
12 20th day of April, A. D. 1875, this plaintiff demanded possession of said goods and chattels of said defendants, but said defendants refused to deliver possession of the same or any portion thereof, notwithstanding this plaintiff then was and now is entitled to the possession of the same.

5. That said defendants do now wrongfully and unlawfully withhold and detain possession of said property, goods, and chattels from the possession of this plaintiff to her damage in the sum of one hundred dollars.

Wherefore plaintiff Sarah J. Fredericks demands judgment against said defendants—

1st. For the recovery of the possession of said property, or for the sum of three hundred and twelve $\frac{50}{100}$ dollars, the value thereof, in case a delivery cannot be had.

2. For one hundred dollars damages for the detention thereof and for costs of suit.

JOHNSTON & TOOLE AND J. H. SHOBER,
Att'ys for Plaintiffs.

MONTANA TERRITORY,
Gallatin County:

Sarah J. Fredericks, being duly sworn, says that she is one of the plaintiffs in the above-entitled action, and that she has heard read
13 the foregoing complaint and knows the contents thereof, and that the same is true of her own knowledge.

SARAH J. FREDERICKS.

Subscribed and sworn to before me this 5th day of May, A. D. 1876.
JAMES G. DOW,
Notary Public.

That thereafter the said defendants filed their answer to said complaint, which said answer is in words and figures following:

SARAH J. FREDERICK', PLAINTIFF,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS,
defendants.

In the first judicial district court, within and for Gallatin County, Montana Territory.

Now come the above-named defendants, by their attorneys, and for

answer to the complaint of the above-named plaintiffs deny each and every allegation in said complaint not herein specifically admitted or denied. Defendants deny that on the 15th day of April, A. D. 1875, or at any other time, or at any time prior thereto, plaintiff had been or was the sole or exclusive owner or possessed in her own right, or
14 otherwise, as sole trader or otherwise, of the fifteen (15) sacks of choice XXX (triple X) flour, as described in said complaint, or any part thereof, or any flour at all.

Denies that she was the owner of or seized or possessed in her own right of thirty-five hundred shingles or any shingles whatever.

Denies that she was the owner of four thousand five hundred feet of dry white-pine lumber or any part thereof, or that any part of the same was her sole or separate property.

Denies that said flour was of the value of one hundred and twelve dollars and fifty cents, or that said shingles were of the value of twenty dollars, or that said lumber is or was of the value of one hundred and eighty dollars.

Denies that on the 15th day of April, A. D. 1875, or at any other time while said plaintiff was the sole or exclusive owner of said property, these defendants wrongfully or unlawfully took said goods or chattels or any part thereof from the possession of said plaintiff. Denies that on the 20th day of April, A. D. 1875, or at any other time said plaintiff demanded possession of said goods and chattels of or from
15 defendants or that said plaintiff is or was entitled to the possession of the same or any part thereof.

Denies that defendants wrongfully or unlawfully withholds or detains possession of said goods and chattels or any part thereof, or that said plaintiff, by reason of any act on their part or either of them, was damaged in the sum of one hundred dollars or in any sum or part thereof.

Denies that plaintiff is entitled to the possession of said property or for judgment for the sum of three hundred and twelve $\frac{50}{100}$ dollars or any part thereof or for costs of suit.

The defendant further answering, avers the facts to be that on or about the 8th day of March, A. D. 1875, the said defendant Charles L. Clark was then the acting sheriff of Gallatin County, in said Territory of Montana, and that on or about the day and year last aforesaid as such sheriff under and by virtue of law separate writs of attachment issued out of the office of the clerk of the district court in said county of Gallatin and Territory aforesaid, and in a certain cause then pending, wherein Andrew J. Davis was plaintiff and William H. Drew were defendants, and the other in a certain other case then pending
16 wherein the said Andrew J. Davis was plaintiff and the said Wellington A. Fredericks was defendant, said writs bearing date the 6th day of March, 1875, did, by virtue of the authority therein contained, seize and levy upon as the property of the said Wellington A. Fredericks, the defendant in said writs of attachment, certain goods and chattels consisting of flour, shingles, and lumber, a portion of which is attempted to be described in plaintiff's said complaint for greater certainty as to the description of said property so seized by virtue of said writs of attachment as aforesaid, reference be had to the return of said sheriff on said attachments. Defendant further avers that the goods and chattels so levied upon as aforesaid at the time aforesaid were at the time of such levy and seizure the property of the said Wellington A. Fredericks, one of the plaintiffs to this action, and subject to be seized and taken on attachment as security for said Wellington A.

Fredericks' said debts and demands, and if the said Sarah J. Fredericks ever at any time had possession of said property or any part thereof, or of the goods and chattels set forth in plaintiff's complaint.

17 Defendants aver that such possession was a fraudulent one, and that the same were held by her for said Wellington A. Fredericks under cover of some false and pretended claim of right or title to cover up and conceal the same from defendant Davis and other creditors of her said husband, the said Wellington A. Fredericks, and to hinder and delay and defraud said defendant and the other creditors of the said Wellington A. Fredericks and to prevent the collection of their just debts and demands.

Defendant, further answering, avers that on and prior to the year A. D. 1873 the said Wellington A. Fredericks was wholly insolvent, and amongst other creditors was justly owing this defendant A. J. Davis in divers and sundry large sums of money, amounting in the aggregate to the sum of eight thousand dollars, to secure a part of which sums the attachments aforesaid were issued as aforesaid, and was then the legal and equitable owner of an undivided one-half of that certain grist mill or flouring mill situate on Willow Creek, in the county of Gallatin, Territory aforesaid, together with one-half of the mill site or grounds belonging to the same, also to one-half of the water rights, ditches, and flumes pertaining thereto, and for the purpose of hindering, de-

18 laying, and defrauding his said creditors, caused the same to be conveyed to the said Sarah J. Fredericks for a false and pretended consideration, not a dollar of which was paid by the said Sarah J. Fredericks. That she has ever since and now holds the naked legal title to said property, the said Wellington A. Fredericks at all times since managing and controlling the same as his own property, receiving and appropriating the profits and proceeds thereof to his sole and exclusive use and benefit, and that all the said property, goods, and chattels described in said complaint is and was derived from the profits and proceeds of said mill, and is and was at the time of said levy and seizure the property of the said Wellington A. Fredericks, and subject to be seized and attached for the payment of his said debts.

Affiant further avers the facts to be that the so-called sole tradership of the said Sarah J. Fredericks is and was a trick and fraudulent device on her part for the more effectually hiding, covering up, the property of the said W. A. Frederick', and whatever pretended title she may have acquired to said property she only holds the same in trust for the sole use and benefit of the said Fredericks.

SAMUEL WORD, R. T. VIVION.

19 THOS. EDWARDS AND JAS. G. SPRATT,

Defendants' Attorneys.

TERRITORY OF MONTANA,
County of Gallatin, ss:

A. J. Davis, being first duly sworn, on his oath states that he is one of the defendants in the above-entitled action; that he has heard the foregoing answer read, and that the facts therein stated are true of his knowledge.

A. J. DAVIS.

Subscribed and sworn to before me this October 27th, 1876.

THEO. MUFFLY, *Clerk.*

That thereafter the said plaintiffs filed their replication to said answer, which said replication is in words and figures following, to wit:

Replication.

In 1st judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

Now comes the plaintiff Sarah J. Fredericks, and for replication to the answer of defendants herein—

1st. Denies that any of the property mentioned in plaintiffs' complaint was the property of Wellington A. Fredericks, and denies that Wellington A. Fredericks ever had any interest in any of said property.

2. Denies that said Wellington A. Fredericks ever had any interest in the grist mill in defendants' answer described, nor the water right, machinery, privileges, nor appurtenances thereto belonging.

3. Denies that said Wellington A. Fredericks, for the purpose of hindering, delaying, and defrauding any of his creditors, he caused the legal title of the one-half of said mill, machinery, and appurtenances to be vested in the said William H. Drew; and denies that he caused it to be held by him in trust for the use nor benefit of him the said Wellington A. Fredericks, for any purpose whatever; and denies that the said Wellington A. Fredericks ever had any title, legal or otherwise, to said property vested in himself or any one else.

Denies that said Wellington A. Fredericks caused the said Wm. H. Drew to convey the legal title to said one-half of the said mill property to this plaintiff with the understanding between them that the same should be held by this plaintiff in trust for his, Wellington A. Fredericks', sole or exclusive use or purpose, and denies that there was any understanding between said Wellington A. Fredericks and said William H. Drew in relation to said mill property; and denies that this defendant accepted any conveyance nor trust for the purpose of nor with the intent to hold said property for the use or benefit of the said Wellington A. Fredericks, nor for the purpose of covering up, hindering, nor secreting the same from the creditors of the said Wellington A. Fredericks, nor for the purpose of hindering, delaying, nor defrauding them in any manner.

4. Denies that the said Wellington A. Fredericks has ever managed, used, nor controlled the said property, nor the benefits, profits, nor proceeds arising from the same, nor any portion thereof, in any manner whatever.

5. Denies that any of the property attached by the said Charles L. Clark was, at the time of the levy of the writ of attachment, nor at any other time, the property of the said Wellington A. Fredericks, and denies that the property mentioned in plaintiffs' complaint was the proceeds of said mill, and denies that the proceeds of said mill ever were subject to attachment nor seizure as the property of said Wellington A. Fredericks; and denies that said Wellington A. Fredericks ever had any attachable interest in any of the property in plaintiffs' complaint mentioned; and denies that said Wellington A. Fredericks ever had any attachable interest in said mill mentioned in defendants' answer herein; and denies that he ever owned any interest in said mill.

6. This plaintiff denies that for any fraudulent purpose she filed her declaration of intention of being a sole trader.

7. Denies that under any false nor fraudulent practice that she has pretended to own, control, nor manage any of the property of Wellington A. Fredericks, but avers the fact to be that she has only sought to manage and control her own individual and sole property, and to protect herself in her own individual and sole property and rights.

8. Denies that she has permitted, at any time, the said Wellington A. Fredericks to manage nor control any of the property in her complaint herein mentioned, nor any of the property in defendants' answer herein mentioned, as his own property.

9. Denies that she has permitted the said Wellington A. Fred-
23 ericks to apply any of the proceeds nor profits arising from any of said property to his own use nor purpose.

10. Plaintiff denies each and every allegation in defendants' answer not hereinbefore specifically denied, except that the attachment was duly issued.

Wherefore plaintiff prays judgment, as in her complaint herein prayed for.

JOHNSTON & TOOLE,
CULLEN AND SANDERS AND J. H. SHOBER,
Att'ys for Plaintiff.

TERRITORY OF MONTANA,
Gallatin County:

Sarah J. Fredericks, being duly sworn, says she is one of the plaintiffs in the foregoing-entitled action, and that she has heard read the foregoing replication and knows the contents thereof, and that the same is true of her own knowledge except as to the matters therein stated on information and belief, and as to those matters she believes it to be true.

SARAH J. FREDERICKS.

Subscribed and sworn to before me this 15th day of December, 1876.

GEORGE L. DUKE,
Justice of the Peace.

24 That thereafter, to wit, on the 11th day of May, A. D. 1877, and at the May term, 1877, of this court, an order was made therein consolidating the two foregoing actions.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
CHARLES L. CLARK ET AL., DEF'TS. } Consolidated with case No. 4. (132.)

Come as well the said plaintiffs by Messrs. E. W. Toole and John H. Shober, esq'r's, their counsel, as the said defendants by Messrs. R. P. Vivion, T. R. Edwards, James G. Spratt, William Chumasero, and A. M. Woolfolk, esq'r's, their attorneys. Whereupon by consent of counsel it is ordered here by the court that this cause be and the same is hereby consolidated with cause No. 4 (132), entitled Sarah J. Fredericks against Charles L. Clark, sheriff, &c.

These causes thereafter were proceeded with in said court under the title of the cause of Sarah J. Fredericks and Wellington A. Fredericks, as plaintiffs, vs. Charles L. Clark and Andrew J. Davis, defendants.

On appeal the defendants submit the following statement:

25 (132) SARAH J. FREDERICKS ET AL. *vs.* CHARLES L. CLARK, SHERIFF,

AND

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks *vs.* CHARLES CLARK AND ANDREW J. DAVIS.

PLAINTIFFS' TESTIMONY.

SARAH J. FREDERICKS. Known Davis since '66, and Clark since '75. I am engaged in milling and blacksmithing, as sole trader, since spring of 1874. (Here witness produced and identified her sole-trader papers, to wit:)

Declaration of the intention of Sarah J. Fredericks, a married woman, to transact business in her own name as sole trader.

Know all men by these presents that I, Sarah J. Fredericks, a married woman, residing with my husband at Gallatin City in Gallatin County, Montana Territory, being desirous of availing myself of the benefits of an act of the legislature of the said Territory of Mon-
26 tana, entitled "An act to authorize married women to transact business in their own names as sole traders," approved February, 1874, do hereby make and publish, and by these presents give notice unto all persons concerned or in anywise interested, that this my declaration of intention of transacting business in my own name as sole trader is made under the provisions of said act, and that from and after the date of the proper record of this declaration, it is bona fide my intention to carry on and transact the business of a flour manufacturer and miller; and that it is further my intention to also carry on and transact the business of a stock raiser, owner and grazer; also a general blacksmithing business, and furthermore follow and pursue, carry on and transact in my own name and for my own use and benefit and for the benefit of my children or any member of my family who may be dependent on me for support and maintenance, any other business, calling, avocation, profession, or pursuit in life which I may at any time find it necessary to enter upon or engage into for the purpose, and for the proper support and maintenance of those who may be dependent
27 upon my exertions for their means of livelihood.

I furthermore make known and declare that the original amount of capital which I have invested in the aforesaid business does not exceed the sum of ten thousand (10,000) dollars, nor was the same derived from any funds belonging to my husband.

In testimony whereof witness my hand and seal this twenty-eighth day of March, A. D. 1874.

SARAH J. FREDERICKS. [SEAL.]

TERRITORY OF MONTANA,
County of Gallatin, ss:

On this 28th day of March, A. D. 1874, personally came before me, Robert W. Hill, a notary public in and for Gallatin County, Montana

Territory, Sarah J. Fredericks, to me well known to be the person who executed the foregoing instrument, and acknowledged that she executed the same freely and voluntarily, and for the uses and purposes therein set forth.

In testimony whereof witness my hand and official seal the day and year first aforesaid.

ROBERT W. HILL,
Notary Public.

{ R. W. HILL, NOTARY SEAL, MONTANA. }

28 Received for record March 30th, 1874, at 4 o'clock p. m. and recorded in Vol. "I" of deeds, pag', 441; fee $3.00.

[GALLATIN CO. SEAL.] ARCH. GRAHAM,
Recorder.

Know the property mentioned in complaint; I held same as sole trader; defendant Clark, as sheriff, took the same from me. The value of the lot attached on March 7, per sack, was $7.00; 15 sacks afterwards attached was $7.50 per sack; the lumber was worth 2 cents per foot; I never knew that the lumber was sold; I forbid them taking the property, as I claimed the same was my own, also same as to Reeves, who claimed to be deputy sheriff. The first lot of flour was worth $7.00 per sack, the last lot attached was worth $7.50 per sack. There was also about 5,000 feet of lumber taken from my possession worth $30.00 to $40.00 per thousand. There was also taken by defendant Clark 3,500 shingles; they were worth $5.00 per thousand; also 107 bushels wheat worth $2.00 per bushel. All of the flour, lumber and shingles were in my possession when levied upon and taken. I forbid the taking of said property at the time and demanded possession of it from defendant Clark several times afterwards and previous to commencing suit.

Cross-examined by def't's:

29 I got the lumber from Drew; Drew owned the saw-mill; I bought the lumber in 1874; it was attached in 1875; I acquired some of the flour by purchase; it was ground at the Willow Creek mills.

Question. When did you get the flour?

(Objected to by plaintiffs as irrelevant, which objection was by the court sustained.

To the sustaining of the said objection and the ruling of the court thereon defendants at the time excepted.)

Question. State how and in what manner you acquired title and possession to the flour described in complaint?

(Objected to as irrelevant by plaintiff, and objection sustained and the witness not allowed to answer same.

To which ruling in sustaining said objection defendants at the time excepted.)

Question. Was or not this flour in controversy the proceeds of toll of said Willow Creek mills for the years 1873 & 1874?

(Objected to by plaintiffs; which objection was by the court sustained and the witness not allowed to answer.

To the ruling of said court as aforesaid defendants at the time excepted.)

Question. Was any portion of said flour the proceeds
30 of said mill during the existance of lease dated November 14,

1873, from defendant Davis to W. A. Fredericks, or at any other time?

(Objected to by plaintiff as irrelevant; which objection was by the court sustained, and to which ruling defendants at the time excepted.)

Question. Do you know of any one else claiming that flour or any part of the same?

(Objected to by plaintiff as irrelevant; which objection was by the court [sustained] *overruled.*

To the ruling of said court in sustaining said objection and in refusing to allow said witness to answer said interrogatory defendants at the time objected, excepted.)

Did any one else other than yourself claim possession of the flour mentioned or in controversy at or the time of the levy of the attachment?

I was not aware that any one did at the time of the levy.

Did you get Mr. Greene to claim said flour at the time of the levy?

(Objected to by plaintiffs; which objection the court sustained and refused to allow the witness to answer. To which ruling the defendants at the time excepted.)

31 Did you not at or before the levy get Mr. Greene to so claim said flour?

(Objected to by plaintiff; to which objection the court sustained and refused to allow the witness to answer. To which ruling the defendant at the time excepted.)

State whether any of this flour so levied upon by the sheriff was from the proceeds of grain purchased by you or was proceeds of grain owned in whole or in part by your husband.

(Objected to by plaintiffs; which objection the court sustained and refused to allow the witness to answer. To which ruling the defendant at the time excepted.)

Plaintiff closed in chief.

Defendant CLARK was here introduced as a witness.

Mrs. Fredericks told me she claimed part and that Granniss claimed 200 sacks of flour; she did not say how much Greene owned nor how much she owned; James Greene presented me an affidavit claiming 200 sacks of the flour attached, which affidavit was here introduced and admitted; I attached 496 sacks on March 8, 1875; of this number I returned to John W. Granniss 201 sacks on his affidavit

32 of ownership; other flour was delivered to other parties who claimed; 2 sacks were stolen from me; one sack was returned to the plaintiffs; so making of this 496 sacks I attached, I sold at public auction 280 sacks.

Copy of sheriff's return on attachment.

I, C. L. Clark, sheriff of Gallatin County, Montana Territory, hereby certify and return, that by virtue of the writ of attachment hereunto appended I did, on the 8th day of March, 1875, levy upon as the property of the said defendant W. A. Fredericks the following described property, to wit:

The one equal and undivided half of the Willow Creek grist or flouring-mill, situate on Willow Creek, on section number seven (7), township numbered one (1), south of range numbered one (1), east of the lands granted to the North. Pacific Railroad Company by the United States, together with the equal one-half of all and singular the tene-

ments, hereditaments and appurtenances, as well as the one-half of all the mill-dams, races, flumes, fixtures and machinery thereunto belonging or in any wise appertaining; also 498 sacks of flour, a quantity of wheat, bran, shorts, and all the tools and other property in the
33 building claimed or owned by the said defendant; also a pile of lumber, 500 feet more or less, lying close to the mill; also the frame dwelling-house situate and lying in Gallatin City, Gallatin County, together with the land upon which the house is situated, and the log house occupied by J. H. D. Street, and all other improvements upon said land claimed and owned by said defendant Wm. A. Fredericks.

Witness my hand this the 9th day of March, A. D. 1875.

C. L. CLARK,
Sheriff.

List of property attached by virtue of the writ of attachment hereunto appended, to wit:

One blacksmith's forge, one bellows, one anvil, one vice, two screw-plates, hammers, tongues, coal' chisels, one handsaw, blacksmith's chest, one diamond plow, thirty bushels of charcoal, more or less, one lot of horseshoes (new) and lot of iron, one dirt-scraper.

Witness my hand this the 20th day of March, A. D. 1875.

C. L. CLARK,
Sheriff of Gallatin County, M. T.

I attached in all about 3,000 feet of lumber, more or less, and about 3,000 shingles. The lumber was worth about $25.00 per thousand feet, and the shingles about $2.50 per thousand. I know I bought shingles at that price.

34 Defendant DAVIS was here introduced, and testified as follows, to wit:

About March 20th, 1875, flour was worth about $6.00 per sack at Willow Creek mills, and at the time of sale flour was worth at wholesale about $5.50 per sack, and at retail was worth about $6.00 per sack; the lumber attached was refuse, and was odds and ends left over from building of the mill and had been picked over. It was probably worth $25.00 per thousand feet; the shingles ought to be worth there about $3.50 per thousand. I was present at the time of the attachment, and there was in the mill about 480 sacks of flour. I heard the plaintiff (Mrs. F.) say that the flour in the lower story was Granniss'es. I don't remember that she said she owned any of the flour. She said the flour inside belonged to other parties, and mentioned Granniss; that Granniss owned 200 sacks. I don't know that she stated how much belonged to Greene. I owned ½ of the Willow Creek mills, and W. A. Fredericks owned the other half, and held it in his wife's name. A short time before the levy I was at the mill, and talked to both Mr. and Mrs. Fredericks. Mr. F. went with me to the mill, as I wanted to see how much toll I had, and I could only find about 100 bushels of wheat. I asked if I had any flour from my toll. He gave
35 me no satisfaction. They proposed to buy my interest in the mill with flour that belonged to others; they told me that my toll was stolen by Mood; they would not show me the books; said they were going to Bozeman, and would bring the books with them. Soon after I saw them at Bozeman, and asked them if they had brought up the books; they answered by asking what I would take for my in-

terest in the mill in flour. I charged them with having stolen my wheat and ground it into flour; they did not deny it.

Cross-examined:

I came here in July, 1865, for the purpose of looking at the country and finding a market for goods I had on a train coming to the Territory. I received no proceeds of sale of flour at public sale at time of sale of the flour attached. Flour was worth less in May than April, 1875. I did not charge Mr. Mood with stealing the flour, nor have I ever written any letter indicating any such thing. I think the flour brought from $5.35 to $6.00 per sack. This, or the most of this, lumber came from the Fredericks & Drew mill; at least this is what both told me. Drew told me that the shingles came from his mill. The man
36 that bought this flour conveyed it to Helena, and lost money on it. I believe there was no more than 6 or 8 thousand shingles levied upon. Mr. Fredericks had the key of the mill and refused to let me in the mill where the flour was stored. Mrs. Fredericks told me that she intended to take out or file papers as a sole trader, as Thomas was watching Mr. Fredericks with intention of levying upon his property to satisfy a judgment; that either Toole or Street had advised her to do so. Mr. Fredericks & Mr. Drew owned one-half of the mill at the time I leased my half to Fredericks. I never sold to Mrs. Frederick, but did convey without consideration to her the old Ault mill that stood above Fort Ellis, and that was afterwards removed to Middle Creek. I never saw the deed transferring the saw-mill from Mrs. Fredericks to Drew, and Drew's interest in grist-mill to Mrs. Fredericks; but both told me this had been done, and so Fredericks informed me. I don't know that she ever told me in Helena that she was going to take out sole-trader's papers. As to the sale of flour at the Willow Creek mill I do not remember that I directed the sheriff to sell, or that I directed my attorneys to have it done. I don't know who hauled the flour so sold by the sheriff to Helena. I did not have anything to do with the flour after it was sold.

Redirect examination:

37 At the time of the sale of the flour, it was difficult to get transportation, because of bad roads. It was lower than in March. In 1870 or 1871, I conveyed to Mrs. Sarah J. Fredericks the undivided one-half of the Ault saw-mill, it being the same interest held by me for Mr. W. A. Fredericks. Mr. Ault was owing myself and Mr. Fredericks jointly. Mr. Ault gave me a mortgage in my name to cover the entire debt. This mortgage I foreclosed and purchased the property for myself and Mr. Fredericks and held it in my own name. Afterwards Mr. Fredericks requested me to convey his half interest in the property to his wife, which I did without any consideration whatever, passing from Mrs. Fredericks. I conveyed my half interest in the saw-mill to W. H. Drew. In relation to the building of the Willow Creek grist mill, I was to furnish all the machinery and be one-half owner of the same. Mr. W. A. Fredericks and W. H. Drew were to furnish all other material; build the mill and be joint owners of the other half. Near the completion of this grist-mill Mrs. Sarah J. Fredericks conveyed Mr. W. A. Fredericks' interest in the saw-mill, so held by her in her name, to W. H. Drew, in consideration of which W. H. Drew conveyed his interest in the grist-mill to Mrs. Sarah J. Fredericks. There was no con-
38 sideration save the exchange as above. This contract was made between W .A. Fredericks and W. H. Drew in my presence at my house in Helena in the spring of the year 1874; afterwards, Mr. Fred-

ericks had possession of the grist-mill and retains possession of the same and now manages and controls the same.

Recross-examination:

I was, I believe, at the mill in Feb'y, 1874, and stayed over night. Fredericks was in possession of my half of the mill under lease. I don't think the lease and exchange of interests by Fredericks and Drew were made at the same time. I am not able to state.

Re-examination:

There was no consideration from Mrs. F. to me for conveying F's. interest in saw-mill to her.

CLARK recalled in chief:

Fredericks had possession of the grist-mill when I attached the flour; 498 sacks I attached; I sold 280 sacks; 201 sacks were delivered to Grannis on his affidavit; 5 sacks were delivered to another party upon his affidavit; 2 sacks were stolen from my possession; 8 sacks to Mr. Finsley on his receipt; 282 sacks were stolen from me
39 at the mill after the levy, and I found all in Mrs. Sarah J. Fredericks' house. I have since refreshed my memory as to price of flour at the time and it was worth $5.25 per sack of 100 pounds.

Cross-examined:

I sold 280 sacks of flour at public sale at my own instance; I sold April 17, 1877; have talked to defendant Davis about it, and he gave me an indemnity bond. I gave Mrs. F., by consent of Davis, one sack of the 498 sacks of flour. Davis' attorneys drew the bond and obtained the signatures to it and gave it to me. Davis' name is not to the bond

W. V. RYAN. I know the Willow Creek mill, and Mr. F. constructed it. I owned the ground and Mr. F. contracted with me for the ground on which to build the mill. He was building the mill, and afterwards him and Davis was to build; Davis to furnish the machinery and F. to build and furnish the lumber, and he has been there in possession ever since.

Cross-examined:

Mrs. F. now lives at the mill. I have been at the mill in the interest of Davis and in possession of his half. Mrs. F. claimed to own one-half and claimed all the flour attached.

40 Re-examination:

I was there in the fall of 1875, in the interest of Davis, and the mill was built in 1873.

Recross-examined:

I don't know when Mrs. Fredericks first claimed interest in the mill.

MARSHALL CORSIEN. In March, 1875, Mr. and Mrs. Fredericks asked me to store some flour, as they thought Mr. Davis wanted to attach it. In last of February or 1st of March, 1875, Mr. Fredericks wanted me to take some flour. I told him I could not; that I was too poor. He said Mrs. Fredericks would hand me the money, and I could return it to her. This was flour then at the Willow Creek mill.

Cross-examined:

They never told me whose flour this was.

C. W. HASKINS. I knew Mr. and Mrs. F. before March 8th, 1875.

Rebuttal by plaintiffs.

ELLISON. Know Mrs. Fredericks since spring of 1874 at Willow Creek mill. She bought some wheat in 1874. I know she bought 3 or 4 lots of wheat of Deep Creek and Boulder. Of this amount all that I stored was stored upstairs on floor of mill. Mill started up somewhere in last of July or 1st of August, 1874. I don't know how the wheat was tolled in respect to her wheat. I know that there was in July, '74. I hauled after I went there about 4,000 feet.

Cross-examined:

I was used for different purposes around the mill. Mr. Fredericks did the work. Mrs. Fredericks hired me, and I looked to her for the money. I knew nothing about the ownership except what she told me. I knew of her selling flour to Lane. This was about the time Granniss was there. It was 2 loads that I know of. He paid Mrs. Fredericks for the flour in presence of Bill Ryan. I saw Mrs. Fredericks with the money first. My understanding was, if my eyes did not deceive me, that Mike Lane got the money from Mrs. Fredericks, and he gave it back to her in 15 minutes, in presence of Mr. Ryan. I went to work there in fall of '75, and continued there until some time in 1875.
42 I heard that Mrs. Fredericks was to give Lane the money, and he was to give it back to her. The first load he hauled was about 20 sacks; it may have been 15 sacks.

Re-examination:

I think this was in the fall of 1875. I don't know whether it was after the attachment.

JOHN W. GRANNISS. I was employed at Willow Creek mill in fall of '74 as miller. Mrs. Fredericks had wheat there then, up-stairs in a bin, that she claimed as her own. There was some toll wheat put in with it. Her toll was then put in. I ground the wheat, and as thus ground was placed in the northeast end of the mill, and this flour was attached.

Cross-examined:

I ground out of this bin. I ground 200 sacks of flour. I can't say how this bin of wheat was accumulated. While I was there Mr. Fredericks put her principal toll in this bin. I saw toll wheat in sacks; don't know to whom it belonged, and don't think any of it was ground with the bin wheat. There was other flour in the mill, and I don't know from what wheat it was ground. Must have been 500 sacks flour
43 in mill when I left and some wheat. This 500 sacks included the 200 I had there in the mill. All the wheat ground while I was there was tolled; one-sixth bushel is the amount toll taken. I was there a few days in the middle of March, '75. Davis' toll was kept separate, and not mixed with Mrs. Fredericks'.

MIKE LANE. Mrs. Fredericks has carried on the mill as sole trader 3 or 4 years. I don't know of her buying any wheat in fall of 1874. I was in employ of Mrs. Fredericks in 1874, and maybe in 1875. There was wheat in the mill of '74 that Mr. Fredericks said was the woman's toll. At the time I bought the flour referred to by Allison of Mrs. Fredericks, Allison was working there, and it was several months after the flour in controversy was attached. It was no part of this flour I purchased.

J. V. RYAN. I was at the mill in Sept., '75, in the employ of Davis. It was along in the winter of '75 that Lane got the flour referred to by Allison; it was several months after the attachment.

44 WATTS. Know Mrs. Fredericks since 1873. She has been in the milling business. She bought wheat in March, 1875. I was called on about April 15, '75, to help Mr. Fredericks measure the lumber, and I think there was 5 or 6 thousand feet; there was 17 bunches of shingles. I knew she was purchasing wheat on her own account as sole trader in March, 1875, and I sold her some. I know she ground it into flour, and the flour was in the mill.

(Motion to strike out testimony as to lumber was sustained.)

Mrs. FREDERICKS. I was living on Willow Creek when I got out my sole trader's license. I talked with defendant Davis about it at Helena and Willow Creek mill, and consulted with Toole about at request of Davis. The wheat in the bin upstairs I got from several parties, viz: Mr. Hartman, James Harper et al., Dr. Franur, Mr. Watts, and another; all this amounted to 700 bushels of wheat. Of this Granniss ground 202 sacks, and balance by Fredericks. I first obtained my deed to my interest in the Willow Creek mill on March 31st, 1874. (The deed is here admitted in evidence.) I was plaintiff in an action to determine my title in this property.

45 (The pleadings in title case are here introduced and objected to, and objection overruled, and ruling excepted to.

Contract between Davis and Drew in building the Willow Creek mill was offered; objected to; objection overruled, and to ruling defendants excepted.)

This Lane flour was sold in November, 1875.

Cross-examination:

First attachment was issued on March 8, 1875. Hartman, 25 bu.; Do. Franse, 63 & 14 bu.; from Deep Creek, 50 bu., and again 550 from another gentleman; Harper, 10; Watts, 58^{53} bu. I paid for all this wheat in my own money. I am blacksmithing. Mr. F. does the work and I pay him. I borrowed the money from W. L. Perkins, $500.00. I paid $1.00 per bu. for wheat cr. & 1.25 for bal'c. I borrowed the money about July 1, 1874. Sold my toll and repaid it in 1875; about 160 sacks of my toll. I sold my toll principally to Kleinschmidt. Mr. Hall may have got a few sacks. I have told you where and how I got all of this flour; it was from the wheat purchased by me in May, 1874. I purchased 25 bushels from Hartman, six and one-half sacks of flour of Tickney. In June, 1874, I purchased 50 bushels of Chrisman, and 550 bushels of Drainsky, from Deep Creek, which delivered some

46 time in the fall of 1874, in different parcels. I purchased 30 bushels of Defrane, and some other small lots of different parties. This is how I got title to and possession of the flour sued for in this action. No part of it was tolls of 1873 or 1874, and no one had any interest in it except myself. None of said flour was proceeds of the mill during the existence of Fredericks' lease. He always took his own flour and disposed of it himself. I do not know what he did with it. I controlled my own and tried to keep Davis from getting hold of it. I contracted to sell Green some flour, but it was attached before delivery, and the contract fell through. I knew of no one claiming possession or the right of possession to any of the flour attached but myself.

I never got any one to claim possession of it. None of the flour was from grain owned by my husband. I have told you how I got all of it two or three times.

Deed.

Know all men by these presents that we, William H. H. Drew and Annie Drew, his wife, of the county of Gallatin, in the Territory of Montana, in consideration of the sum of $2,000.00 (two thousand dollars), to them in hand paid by Sarah J. Fredericks, of the said
47 Gallatin County, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, remise, release, and quitclaim unto the said Sarah J. Fredericks, and to her heirs and assigns forever, the following described real estate, situate in the county of Gallatin, in the Territory of Montana, to wit:

One undivided one-half of a certain flouring mill, situate at the upper end of Lower Willow Creek Valley, on the northeast quarter of the southeast quarter of section seven, township one south, of range east, together with the same half interest in and to all the tools, implements, water rights, mill-dams, and all the appurtenances thereto belonging or in any wise appertaining; also the whole of the dwelling-house situate on the said mill ground, with all the tenements, hereditaments, and appurtenances thereunto belonging; and also all the estate, right, title, interest, claim, and demand whatsoever, in law or in equity, of the said William H. H. Drew and Annie Drew in and to the said premises and the appurtenances, to have and to hold the same unto the said Sarah J. Fredericks, her heirs and assigns, forever.

48 In witness of which we have hereunto set our hands and seals on the thirtieth day of March, A. D. 1874.

WM. H. H. DREW. [SEAL.]
ANN DREW. [SEAL.]

TERRITORY OF MONTANA,
County of Gallatin, ss:

On the thirteenth day of March, A. D. 1874, personally came before me, the undersigned, notary public within and for said county, W. H. H. Drew and Ann Drew, his wife, to me known to be the persons described in and who signed the foregoing conveyance as grantors, and acknowledged that they had executed the same freely and voluntarily for the uses and purposes therein expressed. And the said Ann Drew was made acquainted with the contents of said conveyance and acknowledged, on examination apart from and without the hearing of her husband, that she executed the same freely and voluntarily without fear or compulsion or undue influence of her husband, and that she does not wish to retract the execution of the same.

In witness of which I have hereunto subscribed my name and affixed my seal on the thirteenth day of March, A. D. 1874.

[L. S.] J. J. DAVIS,
Notary Public.

49 Received for record March 31st, 1874, at 4 p. m., and recorded in vol. "I" of deeds, at page 444.
Fees, $2.50; paid, $2.50.

ARCH. GRAHAM,
Recorder.

In the district court, first judicial district, Gallatin County, Montana Territory.

SAHAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS AND CALEB GILBERT,
defendants.

1st. Now comes the plaintiff in the above-entitled cause and states that she is a married woman and as such seized and possessed in her own right and of her sole and separate property of an undivided one-half of the premises hereinafter mentioned; that the said defendant, Andrew J. Davis is the owner of the undivided other half thereof, and that the same is held, occupied, and possessed by said plaintiff Davis as tenants in common, and that no other person has any interest therein save said Gilbert, who holds a mortgage of record for about $4,000.00.

2. That said property is known and designated as a certain
50 flouring mill situate at the upper end of lower Willow Creek valvey, on the northeast quarter of the southeast quarter of section seven, township one south, of range one east, with all the tools, implements, water rights, mill-dam, and all the appurtenances thereto belonging or in anywise appertaining, all in the county of Gallatin and Territory of Montana.

3. That said plaintiff and defendants are not interested in any other real or personal property, as tenants in common or otherwise, jointly in the Territory or elsewhere.

4. That plaintiff is desirous of having partition or sale made of said property, and that plaintiff verily believes, and therefore avers, that partition or division thereof cannot be made according to the respective interests of the parties therein without great prejudice to the owners thereof.

5. And the said plaintiff, for further cause of complaint, shows unto this honorable court that since the 15th day of December, A. D. 1873, and at the present time, there has been no settlement or accounting between this plaintiff and said defendant Davis for or on account of divers and sundry sums of money, labor, and material by them
51 and each of them laid out and expended in and about preserving, operating, and taking care of said mill, mill-dam, water right, and property, and that during said time said defendant Davis became and is indebted to this plaintiff for and on account of money, work, and material paid, laid out, and expended in and about improving and operating said property in the sum of about six thousand five hundred dollars, the one-half of which sum is $3,250.00, now coming to plaintiff by said defendant Davis over and above all just claims or demands of said defendant Davis; that said amount was necessary to be expended as aforesaid and upon said property, and that the same added greatly to the value thereof.

Wherefore plaintiff prays this hon. court that said property and the whole thereof be sold according to the rules and practice of this court and the law applicable thereto; that the proceeds thereof, after paying the costs and expenses of sale (whatever amount), be returned unto this court, and that the same be divided and paid over to the parties hereto in accordance to their respective rights and interests in the premises; that an accounting be had between this plaintiff and said defendant Davis, and the amount found due plaintiff be paid out
52 of the proceeds of said sale as in equity and justice it should be,

and that judgment therefor be given accordingly, and that plaintiff have such other or further relief as may be just and equitable.

SHOBER AND JOHNSTON & TOOLE,
Attorneys for Plaintiff.

TERRITORY OF MONTANA,
County of Gallatin, ss:

Sarah J. Fredericks makes oath and says that she is the plaintiff herein; that she has heard the foregoing complaint read and knows the contents thereof, and that the matters therein stated are true of her own knowledge except as to such matters as are therein stated on information and belief, and as to those matters she believes it to be true.

SARAH J. FREDERICKS.

Subscribed and sworn to before me this 16th day of March, A. D. 1875.

D. H. KITCHAM,
A Justice of the Peace in and for Gallatin County, Montana Territory.

Filed March 15th, 1875.

W. T. DAVIS, *Clerk.*

53 In the district court, first judicial district, county of Gallatin, Territory of Montana.

ANDREW J. DAVIS, PLAINTIFF,
vs.
WELLINGTON A. FREDERICKS, DEFENDANT.

And now comes the above-named plaintiff, by leave of the court first had and obtained, and, complaining of the above-named defendant, avers that heretofore, to wit, on the 14th day of November, A. D. 1873, at the county of Gallatin, in the Territory of Montana, the said plaintiff was the owner and in the actual possession of an undivided one-half of a certain flouring and grist mill, situate on what is known as Willow Creek, in the said county of Gallatin; that on the day aforesaid the said plaintiff and the said defendant entered into a contract, in writing, whereby the said plaintiff leased to the said defendant the said undivided one-half of said mill and the appurtenances for the term of one year from the aforesaid date, which said written contract was duly executed by the said plaintiff and the said defendant; that by the terms of the said contract the said defendant, in consideration of the
54 covenants and agreements on the part of said plaintiff contained in the said contract or lease, undertook and agreed to pay and deliver to said plaintiff one-fourth of the gross earnings and receipts of the said mill and premises, including wheat bran, screenings, and all kinds and description of produce usually received and ground at flouring and grist mills; that under said contract or lease the said defendant entered in and took possession of the said plaintiff's one-half of said mill on the day aforesaid and all the appurtenances connected therewith, and has used and occupied and possessed the same from said 14th day of November, A. D. 1873, until the day of the commencement of this action, the said defendant holding over and retaining the possession thereof under the stipulations, provisions, and agreements of the aforesaid contract and lease; that the gross earnings of said mill and

premises during the time aforesaid are and have been, grain, flour, bran, shorts, and screenings, of the value of ten thousand dollars; and that on' *the* fourth of said gross earnings of said mill are and have been of the value of two thousand five hundred dollars, and the same are now due, unpaid and undelivered to this plaintiff; that the said plaintiff heretofore, to wit, on the 5th day of March, 1875, at the said county of Gallatin, demanded from the said defendant the payment and delivery to him of the said one-fourth of the gross earnings of said mill as aforesaid, under the said contract due and deliverable to him, the said plaintiff, but to pay or deliver the same, or any part thereof, the said defendant hath heretofore failed and refused, and still doth fail and refuse. And the said plaintiff, further complaining, for a separate cause of action alleges that on the 10th day of October, A. D. 1867, at Gallatin City, in the county of Gallatin, Montana, the said defendant made his certain promissory note or contract, in writing, bearing date on that day, which said note or contract, in writing, is in the words and figures following, to wit:

55

GALLATIN CITY, *October 10th*, 1867.

For value received I promise to pay A. J. Davis twelve hundred dollars in flour, at the Helena prices, per quantity, less the freight from this place to Helena, to be delivered on or before the first day of June next. This contract is upon a gold basis.

(Signed) W. A. FREDERICKS.

[Int. rev. stamp, 50 cents.]

And then and there delivered the said promissory note or contract to the said plaintiff, who is now the owner and holder thereof; that the said defendant failed and refused to deliver the said flour, or any part thereof, to the said plaintiff at the time the same was to be delivered under the said instrument in writing above set forth, or at any other time, and failed to pay the said plaintiff the said sum of twelve hundred dollars, or any part thereof, although both said flour and said sum of money were demanded at the time the same was deliverable and payable under the said promissory note or contract; that by reason of the failure of the said defendant to deliver the said flour as provided in the said instrument in writing, this plaintiff has been damaged in the sum of $1,200.00, together with interest on the said amount from the 1st day of June, A. D. 1868.

56

And the said plaintiff, further complaining of the said defendant, for a separate and further cause of action states that the said defendant at the time of the commencement of this action was indebted unto him on open account in the sum of four thousand six hundred dollars, the same being for divers and sundry sums of money loaned the said defendant at his special instance and request between the 10th day of October, A. D. 1867, and the 1st day of February, 1874, and for money paid, laid out, and expended for the said defendant at his special instance and request by this plaintiff between the days aforesaid, and for lumber, blacksmith's tools, and goods, wares, and merchandise sold and delivered to the said defendant at his special instance and request between the dates last aforesaid; that no part of the said sum of $4,600.00 has been paid by the said defendant, although often demanded.

57

Wherefore the said plaintiff demands judgment against the said defendant for the sum of $2,500.00, with interest thereon from the 6th day of March, 1875, and also for the sum of $1,200.00, with interest due thereon from the 1st day of June, A. D. 1868, and also for the sum of

$4,600.00, with interest thereon from the 1st day of February, A. D. 1874, besides costs of suit.

SAMUEL WORD, THOS. EDWARDS,
CHUMASERO & CHADWICK,
Plaintiff's Attorneys.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

Andrew J. Davis, being first duly *duly* sworn, deposes and says that he is the plaintiff named in the foregoing amended complaint; that he has heard the same read and knows the contents thereof; that the
58 same is true of his own knowledge except as to those matters stated on information and belief, and as to those matters he believes it to be true.

A. J. DAVIS.

Subscribed and sworn to before me this 1st day of April, A. D. 1876
W. F. CHADWICK,
Notary Public.

(Endorsed:) No. 2. Andrew J. Davis vs. W. A. Fredericks. Amended complaint. Filed April 5th, 1876.

W. T. DAVIS, *Clerk.*

A true copy. Attest my hand and seal of said court affixed this 14th day of May, A. D. 1877.

THEO. MUFFLY, *Clerk.*

I, C. L. Clark, sheriff of Gallatin County, Montana Territory, do hereby certify and return, that by virtue of the writ of attachment hereunto appended I did, on the 8th day of March, 1875, levy upon the property of the said defendant, W. A. Frederick, the following described property, to wit:

The one equal and undivided half of the Willow Creek grist or flouring mill situate on Willow Creek, on section numbered seven (7), township numbered one (1) south, of range numbered one (1) east of the lands granted to the North. Pacific Railroad Company by the
59 United States, together with the equal one-half of all and singular the tenements, hereditaments and appurtenances, as well as the one-half of all the mill dam, races, flumes, fixtures and machinery thereunto belonging or in any wise appertaining; also 498 sacks flour, a quantity of wheat, bran, shorts, and all the tools and other property in the building claimed or owned by the said defendant; also a pile of lumber, 500 feet more or less, lying close to the mill; also the frame dwelling-house situate and being in Gallatin City, Gallatin County, together with the land upon which said house is situated, and the log house occupied by J. H. D. Street, and all other improvements upon said land claimed and owned by said defendant, W. A. Fredericks.

Witness my hand the 9th day of March, A. D. 1875.

C. L. CLARK, *Sheriff.*

List of property attached by order of the writ of attachment hereunto appended, to wit: One blacksmith forge, 1 bellows, one anvil, one vice, two screw-plates, hammers, tongs, cold chisels, one handsaw, blacksmith chest, one diamond plow, thirty bushels of charcoal, more or

less, one lot of horseshoes (new) and lot of iron, 1 dirt-scraper.
60 Witness my hand the 20th day of March, 1875.

C. L. CLARK,
Sheriff of Gallatin County.

A true copy. Attest my hand and the seal of said court hereunto affixed this 14th day of May, A. D. 1877.

[SEAL.] THEO. MUFFLY, *Clerk.*

Writ of attachment.

In the district court of the 1st judicial district of the Territory of Montana, in and for the county of Gallatin.

A. J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS, DEFENDANT.

The people of the Territory of Montana to the sheriff of the county of Gallatin, greeting:

Whereas the above entitled action was commenced in the district court of the first judicial district of the Territory of Montana, in and for the said county of Gallatin, by the plaintiff in the said action, to recover from the defendant, W. A. Fredericks, in the said action the sum of $2,500.00 *dollars* lawful money of the United States, besides interest at the rate of per cent. per from the day of , A. D. 187 , and costs of suit; and the necessary affidavit and under-
61 taking herein having been filed as required by law:

Now we do therefore command you, the said sheriff, that you attach and safely keep all the property of said defendant, W. A. Fredericks, within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand as above mentioned, unless the said defendant give you security by an undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking and hereof make due and legal service and return.

Witness Hon. F. G. Servis, judge of said district court of the first judicial district, this 6th day of March, A. D. 1875.

Attest my hand and the seal of said court the day and year last above written.

[L. S.] W. F. DAVIS, *Clerk.*

Filed on return March 9th, 1875.

W. F. DAVIS, *Clerk.*

62 In the first judicial district court, within and for Gallatin County, Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS AND CALEB GILBERT, DEFENDANTS.

And now comes the above named defendant Andrew J. Davis, and by leave of the court first had and obtained, and for amended answer to

the said plaintiff's complaint filed herein, denies that the said plaintiff, as a married woman, sole trader or otherwise, is or ever was seized or possessed in her own right and as her own and separate property or otherwise of the property or premises mentioned and described in said complaint.

Defendant admits that he is the owner of the undivided one-half of the said premises and property, but denies that the same is owned or possessed by him as tenant in common or otherwise with the said plaintiff. Defendant denies that no person save the said plaintiff and this defendant has any interest in the said property save said Gilbert,
63 mentioned in the said complaint on the contrary this defendant avers that W. A. Fredericks, the husband of the said plaintiff, is now, and at all times since the erection of said mill in the said complaint *in the said complaint* mentioned has been, the owner of the undivided one-half of the said premises and property and the co-tenant of this defendant. Defendant admits that the mortgage executed by the said plaintiff to the said defendant Caleb Gilbert upon the said premises appears of record in the recorder's office of the said county of Gallatin, but defendant denies that it is any lien upon the said premises, and avers that at the time of the execution thereof the said plaintiff had no interest in the said premises belonging to the said W. A. Fredericks as hereinafter stated, and that there was no consideration for the execution thereof or that the same was ever delivered to the said Gilbert, and that the same was, without the knowledge or consent of the said Gilbert, executed and placed on the records of the said county of Gallatin for the purpose of hindering, delaying, and defrauding this defendant and other creditors of the said W. A. Fredericks, husband of said plaintiff, out of their just debts and demands owing as aforesaid
64 and for that reason the same is fraudulent and void.

And the said defendant, further answering, denies that he now is or ever was indebted unto the said plaintiff in any manner or in any manner or amount whatsoever or in any services or at all on account of work, money, or materials paid, laid out, or expended in or about the improving, preserving, or operating said property and said mill. Denies that plaintiff ever paid, laid out, or expended any money or property or performed any work in or about improving, preserving, operating the said property or mill, or for or about any property in which the said or the defendant has or had any interest whatsoever. And the said defendant, further answering, avers that he and the said W. A. Fredericks are now, and since the day of November, A. D. 1873, have been, the owners of the premises and property in said complaint described, and that on or about the date last aforesaid this defendant leased to his cotenant, W. A. Fredericks, his undivided one-half of the said mill and premises, and that the said Fredericks has held and occupied the same under such lease and agreement from the date aforesaid until about the 6th day of
65 March, A. D. 1875. And the said defendant avers and charges for a further defence to the said action, as well as for cross-complaint or bill therein, that the said mill was contracted and erected, and the material therefor, together with the appurtenances, with the means of the said W. A. Fredericks and the defendant. That the said plaintiff in this action had no estate, real or personal, in her own right or otherwise, and was then and still is the wife of the said W. A. Fredericks, and did not contribute any services whatsoever towards the erection or completion of said mill and premises, and that the said W. A. Fredericks was at the time of the erection and completion of said mill and premises, and ever since has been, and now is, the owner of the same. And

this defendant further answering, avers that at the time of the erection of said mill and the acquiring of the title of the same, and the premises contracted therewith, the said W. A. Fredericks was, ever since, has been, and now is jointly indebted unto this defendant and divers and sundry other persons in large sums of money; that for the purpose of securing the debts and demands of this defendant he commenced his suit in the district court within and for the said county of Gallatin,
66 in the Territory aforesaid, against the said W. A. Fredericks on the 6th day of March, A. D. 1875, and at the same time caused a writ of attachment to be issued from under the hand and seal of the clerk of said court, which said writ was duly served on the said undivided one-half of said mill, fixtures, and appurtenances as the property of the said W. A. Fredericks (a copy of the amended complaint in said cause and writ of attachment is herewith filed and made part of this answer, as Exhibit A and B); that the same is still in full force and effect, and by virtue of said seizure and levy of said writ the said defendant acquired *and became* and now has a lien on the said mill and premises aforesaid to the extent of his said demand; that the said W. A. Fredericks being so indebted as aforesaid, and for the purpose of hindering, delaying, and defrauding defendant and said other creditors out of their just debts and demands as aforesaid, caused a conveyance to be made to the said plaintiff of the said undivided one-half of said mill, premises, and property described in said complaint, and whatever pretended interest or estate shall acquire by virtue of said conveyance had only the effect of vesting in her the naked,
67 legal title to the said undivided one-half of said mill in trust for the sole and exclusive use of her said husband, the said W. A. Fredericks.

And this defendant, further answering, avers *that* the facts to be, that said mortgage executed to the said Caleb Gilbert is and was a part and parcel of the same fraudulent design, combination, and confederacy of the said plaintiff and the said W. A. Fredericks, her said husband, to cover up and place beyond the reach of the creditors of the said W. A. Fredericks the said property mentioned therein; that the said W. A. Fredericks at the date of said pretended conveyance was, ever since has been, and now is wholly insolvent; that the said W. A. Fredericks has remained in the sole and exclusive possession of said mill and premises since the day of November, A. D. 1873, and ever since enjoyed the use, benefits, and profits arising from the same.

And defendant further avers that the said W. A. Fredericks so held and retained the interest of the said defendant in the said mill and premises on such lease until the 6th day of March, A. D. 1875, when the said lease therefor expired and determined; and that on or
68 about the day last above named this defendant demanded of the said W. A. Fredericks, who was then in the possession of his undivided one-half of the said mill and premises, *and unto* the possession jointly with the said W. A. Fredericks *of* the whole of the said premises as a tenant in common *of* the said W. A. Fredericks, but that the said W. A. Fredericks then and there refused to admit the defendant into the joint possession with him of the said mill premises or any part thereof, and refused to allow or admit the defendant into the possession of the same, or any use or enjoyment of the same, or the profits or proceeds thereof, but wholly excludes this defendant from such possession; that the said mill is a flouring mill, and is very valuable for the purposes of grinding grain and producing flour; that there is now and has been since the said date of the exclusion of this defendant from

the said mill an abundance of grain to be ground at said mill, and the use of the same is very valuable.

Wherefore defendant prays that the said W. A. Fredericks be made a party to this suit; that he be required to answer this cross-complaint; that the honorable court may by its judgment and decree declare all pretended deeds and conveyances to the said plaintiff in and to
69 said mill and premises null and void as against this defendant and all other creditors of said W. A. Fredericks; that the said pretended mortgage to the said Gilbert, and all liens against to the demands, liens, and encumbrances of this defendant; that an accounting of all of the proceeds and profits of said mill be had, and that the said plaintiff and her said husband be adjudged to pay defendant all such sums of money as may be found due defendant on the taking of such account; and inasmuch as said mill and premises and property aforesaid cannot be divided in kind without injury to parties and creditors interested therein, defendant prays that the same may be sold in manner and form as prescribed by law, and that the proceeds of said sale be brought into court to await the order of distribution thereof, and for such other relief as shall be agreeable to equity.

WORD AND SPRATT,
CHUMASERO & CHADWICK, &
A. M. WOOLFOLK,
Att'ys for Defendant Davis.

TERRITORY OF MONTANA,
County of Gallatin, ss:

Andrew J. Davis, being duly sworn, says he has heard the foregoing amended answer read and knows the contents thereof; that the
70 matters therein stated of his own knowledge therein set forth on information he believes to be true; that he is one of the above-named defendants.

A. J. DAVIS.

Subscribed and sworn to before me this 14th day of May, 1877.

THEO. MUFFLY,
Clerk.

Filed with the leave of court on payment of costs May 14th, A. D. 1877.

THEO. MUFFLY,
Clerk.

In first judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS, CALEB GILBERT, AND Wellington A. Fredericks, defendants.

Now comes the above-named plaintiff and demurs to all that portion of the answer and cross-complaint averring fraud and averring a lien upon said property by virtue of an attachment inspired by said Andrew J. Davis against the property of Wellington A. Fredericks.

71 1st. Said averments constitute no defense to plaintiff's cause of action.

2. The said averments are redundant and immaterial.

JOHNSTON & TOOLE AND
J. H. SHOBER,
Attorney for Plaintiff.

Filed May 14th, 1877. Theo. Muffly, clerk.

In the district court, first judicial district, Gallatin County, Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS ET AL., DEFENDANTS.

Now comes the plaintiff in the above-entitled cause and for answer to the cross-complaint and new matter set up by defendant Davis in his pleading denies each and every allegation therein contained, generally and specifically; and the said plaintiff specially and specifically denies any and all fraud or collusion, and avers that she is seized and possessed of the property claimed by her in her complaint in this cause and asks that her title thereto be adjudicated and determined herein, and that she have the relief demanded in her complaint.

J. H. SHOBER & JOHNSTON & TOOLE,
Att'ys for Plaintiff.

72 TERRITORY OF MONTANA,
County of Gallatin, ss:

Sarah J. Fredericks, plaintiff, makes oath and says that the matters and facts as stated in the foregoing pleading are true of her own knowledge.

SARAH J. FREDERICKS.

Subscribed and sworn to before me this May 14th, A. D. 1877.

J. H. SHOBER,
Notary Public, M. T.

Filed May 14th, 1877. Theo. Muffly, clerk.

Affidavit.

In the district court, 1st judicial district, in and for Gallatin County, Montana Territory.

ANDREW J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS, DEFENDANT.

COUNTY OF GALLATIN,
Territory of Montana, ss:

Sarah J. Fredericks, a sole trader and doing business in her own name as such sole trader, being duly sworn deposes and says that she is and was at the time of the levy of the attachment in the above-
73 entitled cause the owner of and entitled to the possession of the following described personal property attached in said cause, to wit: eighty-two sacks XXX (triple X) flour of the Willow Creek flouring mill brand; a quantity of wheat (in a pile) containing about (70) seventy bushels; five hundred feet of pine lumber, and the tools and other personal property in the building owned by her; and that the said defendant has not now, nor had he at the time of such levy, any interest in said personal property or any part of it, and further affiant says not.

SARAH J. FREDERICKS.

Sept.	29.	"	paid Clark, of Sterling, for bolting cloth	72 00
		"	118½# plow steel, 50 c	59 50
	Oct.	10.	" 1 cook stove	75 00
78			1 lot dishes	30 00
			1 set blacksmith tools	350 00
Oct.	24.	To	paid Warren Allen	40 70
'68.				
Jan'y	1.	To	cash paid for Fredericks on mill suit to date	721 00
July	4.	"	cash	25 00
"	"	"	expense to Bozeman on his business	15 00
"	8.	"	paid for goods in Helena	59 60
"	15.	"	cash	50 00
"		"	paid expenses in Helena for Fridley, witness	106 00
Aug.	3.	"	" Street and Edwards	320 00
"	"	"	cash	50 00
"		"	paid his expenses to Virginia	40 00
Sept.	16.	"	gold dust	20 00
	22.	"	" "	60 00
		"	currency	15 00
	25.	"	paid King & Gillette	18 25
	"	"	cash	20 00
	30.	"	"	50 00
Oct.	28.	"	paid Edwards	25 00
Nov.	3.	"	paid for him in Deer Lodge	110 00
		"	cash	60 00
	5.	"	paid Edwards	20 00
		"	paid Parrott & Chadwick	100 00
		"	R. P. Vivion	100 00
79			cash paid Edwards	50 00
			bill at Germain's	151 00
			his stable bill	36 00
			his expenses to and from Helena	40 00
			paid Thoroughman and Davis	150 00
		To	paid his portion of Gallatin transcript	46 00
			" transcript to supreme court	150 00
			" expenses to Virginia	14 00
1869.				
Jan'y	10.	To	3 oz. gold dust	54 00
	"	"	paid McCormick's bill of groceries	66 00
	"	"	" " " "	25 02
	15.	"	" " " "	33 25
	20.	"	cash	20 00
			paid Myers for butter	6 20
Feb'y	26.		" Albaugh case	46 20
			" Col. Stafford's fees	130 00
Mc'h	22.		" McCormick's bill of iron & gro	84 73
	28.		" " "	64 80
Ap'l	25.	To	cash	100 00
		"	p'd Street on trip to Helena	64 00
		"	Drew	20 00
	29.	"	paid cash to self at Helena	12 00
		"	" to Wiel	5 00
		"	cash in Helena	35 00
80	July	7.	To paid McCormick bill of groceries	42 20
		8.	" cash	40 00
Sept.	4.		do.	20 00

	10.	Cash paid McCormick for goods	43 25
	24.	" " " " "	64 00
Nov.	5.	" " " " "	73 39
	25.	Cash	10 00
		To Lyman's fees at land office	25 00
Dec.	5.	" cash for wood	5 00
		" " " wagon	25 00
	25.	" " " goods at Helena	40 00
		87 sacks of flour charged to me, but not received, in Wilson's care, $10.00	870 00
Jan'y	10.	To bill of goods per McCormick	71 35
Ap'l	19.	" " " " " "	8 10
May	19.	" " " " " "	24 78
June	8.	" " " " " "	42 50
July	10.	" " " " " "	8 75
Aug.	9.	" bill of iron	54 63
		" horse nails	8 75
Sept.	5.	" bill from McCormick	66 75
Oct.	3	" " " "	34 90
		" 4 half bushels used or sold	8 00
		" 1 saddle & bridle per self	30 00
81		To bill of lumber from Wa	387 00
		" 2 kegs nails	40 00
		" one large store lock	6 00
		" 1 Sibley tent	40 00
		" 1 cook stove from Radersburg	20 00
		" 1 bbl. whiskey used and sold, 40 gal., $6	240 00
		" plows, wagons, & stock not accounted for	300 00
		" cash paid Lyman, land office	155 00
		" " pd. Toole for attending his case	200 00
		" " " R. Arick for assisting	100 00
1873.			
M'ch	13.	To cash	15 00
Ap'l	23.	" 2 wagon tires, 150#, 10	15 00
		" 1 chain & cutter	6 00
	23.	" cash	10 00
		" do	20 00
		" paid Clark, Conrad & Curtin	36 20
		" " S. M. Hall for gro. bill	32 35
		" 2 horses	200 00
May	31.	" cash paid lady	10 00
July	2.	" " " Lyman	10 00
	21.	" 20# 4 qsa. nails, 14	2 80
		" 1 gro., 1½ in screws	2 50
		" 1 " 2 " "	3 00
		Cash paid Clark, Conrad & Curtin	22 50
82		July 25. Paid John Bothwell	38 80
		Aug. 12. To 4 bars of iron, 36 in 12½	4 50
Sept.	11.	To paid wife	5 00
Oct.	1.	" " Lavenburg, per lady	20 00
		" 1 p's yal. iron, 38 to 30	11 40
	13.	" paid to Sands	20 65
	16.	" ½ half proff stall	36 50
		" 1 doz. mill picks	23 00
		" 48 feet screening, 50	24 00

Feb'y 7. " cash pd. Clark, Conrad & Curtin .....
" " " " " " " " old bill .....
1875.
M'ch 1. " amount as near as possible to ascertain of sale of plows, picks, wagons, &c 2
To house and shop rent to date from August 1, 1868, to March 1, 1875 ..... 1, 5
To 1 side-saddle 3
" 1 horse 6
" 1 carpet 4
" 1 stove for sitting-room 3

Received copy of above this Oct. 24, 1877.
TOOLE & JOHNSON, &
J. H. SHOBER,
Att'ys for Defenda

CREDIT.

1866.
May 8. By 1 sash & 1 plow-stock 1
83 May 8. By cash balc. of paying Mrs. Fredericks 11
1867.
M'ch 7. To 5⅞ candles, 50c. .....
July 28. " keeping hogs to date 2
Sept. 25. " balc. on settlement with Jones 2
29. " cash 3
1868.
Aug. 1. By balc. on hand after paying ex. Mrs. F 27
By one-half of am't collected from Ault by Gy 47
1873.
Feb'y 25. " 22 days' work at foundry, 3 6
M'ch 31. 26 " " " " 3 7
May 1. 21½ " " " " 3 6
difference in balc. on scales .....

Receipt.

GALLATIN CITY, *Sept. 13th*, 186

Received of W. A. Fredericks fourteen hundred and fifteen dol and thirty-eight cents, being in full of the within claims and all mands to date.

A. J. DAVI

Drew receipt.

GALLATIN CITY, M. T., *Sept.* 11, 186

W. H. DREW, Esq.:

D'R SIR: The note which I hold against you and W. A. Freder is paid, and I shall not hold you further answerable for said amou
(Signed) A. J. DAVI

84 A true copy of receipt from A. J. Davis to Drew.

Agreement, Davis and Fredericks.

HELENA, *Nov. 14th*, 187

Memorandum of agreement made and entered into this day betw

A. J. Davis and W. A. Fredericks. Said Davis has this day leased his one undivided half of mill on Willow Creek, in the county of Gallatin, Montana Territory for the full term of one year from this date, and the said Fredericks on his part agrees to deliver or store, as per option of said Davis, one-fourth of the gross earnings of the entire mill, including wheat, bran, and screenings, and at whatever time said Davis may require the same ground, to grind the same free of charge to said Davis, by said Davis furnishing sacks for same. Said Fredericks is to be at all expense of running said mill and keeping the establishment in repair.

A. J. DAVIS.
W. A. FREDERICKS.

Deed from Davis to Drew & Mrs. F.

GALLATIN COUNTY, *July 1st*, 1871.

I have this day sold unto Wm. H. Drew and Sarah J. Fred-
85 ericks a certain mill near Bozeman, known as the Ault mill, for and in consideration of the sum of two thousand dollars to me paid, and in consideration of said amount do hereby transfer all of my right, title, and interest in and to said property to said Drew and Fredericks, with all the privileges and appurtenances thereunto belonging, including flume, &c., &c.; and I do hereby warrant and defend the above from and against all persons claiming through or by me up to this date.

A. J. DAVIS.

Toole & Toole account.

Col. A. J. Davis in a/c with Toole & Toole.

To trial tax question Co. com'rs	50 00
" counsel points in agreement land office case, Hot Springs	50 00
" 6 days' trial & argument, Fredericks' case, land office	200 00
" assignment note & mortgage, Everts	10 00
" bill, decree, &c., vs. Germain	150 00
" " " " sample	200 00
" trial &c., vs. Hendrie, D. C	100 00
" " " " sup. ct	100 00
R. boulder bridge, Mc	20 00
To trial & ex. authorities on decree, self vs. Church, C. & C	100 00
86 To 2 com'pl'ts in replevin cases, cattle & counsel, &c.	50 00
1870 to date (to foot)	$1,030 00

CREDIT.

By cash, $500. By cash, $350.00	$850
Balc. due	180 00
Cr. by reduction this day made	180 00

The above comprises a full settlement of accounts to this date, Sept. 9th, 1874.

TOOLE & TOOLE AND,
E. W. TOOLE.

HELENA, *January 27th*, '75.

MRS. SARAH J. FREDERICKS:

I received yours of the 14th inst. a few days since; you seem to talk a little more rational. You say you wish to do what is right, and, if so, bring Mr. Fredericks over with you; there will be no trouble settling everything up. After our matters are settled up, I will then make a proposition to buy or sell, to your satisfaction. Satisfied that I could not run the mill to your satisfaction, and I know you could not to mine. Anything that we cannot agree upon we will refer it to parties that are fully conversant with the matter referred, and abide their decision. I think there will be but a few points,
87 and possibly not any, but what we can settle without arbitration, but should there be, and if we both desire to be just and fair, we certainly will be willing to submit it to the judgment of persons who are disinterested and have a full knowledge of the matter. I have a memorandum of all the matters that was talked over at your place and seemed at that time satisfactory. If you are disposed to act right you will find me always ready to meet you upon those grounds. I regret to learn of your bad health, and hope ere this you have quite recovered. If you will write me and let me know when you will be over, so that I will be here to meet you, I will be much obliged. There will be no use of your coming over unless he come' with you. If you are both here, I think there will be no trouble whatever.

Yours, truly, A. J. DAVIS.

HELENA, *Dec. 19th*, 1874.

W. H. DREW:

On my return I found letter from you stating that you had forgotten the very thing you had come all the way over here to ascertain, and inquire again what you can depend upon for the coming season. When
88 you left here you were to go home and gather up the remaining cattle, sell them, and pay as far as they will go on the note. You were to go on and manage the farm and mill as best you could; that you were to have the balance of my logs sawed up and stacked up with my lumber at the mill; it matters not to me whether you rent the farm and mill or not; all is, I want you to pay as fast as you can, and as long as I am satisfied that you are acting in good faith I do not propose to distress you; all these facts I stated to you when here, and also you promised me the balance due on the June note at the time. I stated to you when here that I did not wish to sell the interest in my mill at Willow Creek, and I now state to you that I have no particular business for you at Willow Creek, save seeing that the dam is completed as per our contract, together with what the court requires. You are also very forgetful; I fear that you would be an unsafe man to intrust business with. Indeed, sir, I should fear that you would recollect more than was said to you. For these reasons I shall de-
89 cline to call upon you to attend to any business for me. I shall soon put a man at Willow Creek to look after my interest at that place.

Yours, truly, A. J. DAVIS.

HELENA, *May 4th*, 1873.

W. H. DREW:

D'R SIR: It is now past the first of May, and the balance on that note is not paid. I am very much in need of money and hope you will

remit the balance, or at least a part of it, on the rest of this note. Fredericks started over to Gallatin last week; probably he is at your place before this; he took over the pinion to your saw-mill. Net Perkins wrote me some time since, desiring to sell me his interest in the judge. in the mill case, and for me to credit you with the amount; the arrangement would not suit me at this time. I hope that you will get the mill up soon on Willow Creek. I will assure you that it is pretty hard on me if I am obliged to lay out of the use of the money invested in machinery much longer; four or five thousand dollars laying idle simply in consequence of you not getting the mill up is no small
90 item; one-half of the profits of a flouring mill will amount to something, and you should hurry up your cakes, for I cannot stand such losses much longer. From present appearances, I have lost the interest on the investment for one year, which of course you would properly be held answerable for, but if you push it now with energy you can make more reasonable terms with me in the end than you can if you still treat the matter with so much independence. I cannot see, friend Drew, why you should be so slack and indifferent in your business. I have always looked upon you as one of our most prompt and energetic men.

You certainly have a plenty of property that you can convert into money and put through all that you have undertaken. I rely in the matter solely upon you, and will expect for you to put your shoulder to the wheel and go ahead.

Yours, &c.

A. J. DAVIS.

91 *Agreement.*

Memorandum of agreement made and entered into this day between A. J. Davis and W. H. Drew: Said Davis agrees to furnish machinery necessary for a flouring mill, to be located on Willow Creek, in the county of Gallatin, in the Territory of Montana, such as water-wheel, 1 p'ts of four-foot mill burs, smut-mill, oat separator, shafting gearing, belting, bolting-cloth, &c.; or, in other words, such machinery as is usually furnished by a tan'y and mill furnishing establishment for flouring-mills, all of which is to be delivered to the mill location on Willow Creek. Said Drew, on his part, agrees to furnish all material for a suitable mill building, and be at all expense of putting up the same and finishing the same in a substantial and workmanlike manner. He further agrees to furnish material and put up at his own expense all necessary machinery, together with the machinery which said Davis is to furnish, in a substantial and workmanlike manner. Said Drew is to put in and furnish material, at his own expense, for a good and sufficient dam across Willow Creek, to be built in a permanent and substantial manner, with tubes and gates upon said dam to be of a
92 sufficient height to give sufficient power or head to propel all of the machinery in said mill to its full capacity. Said Drew agrees to do all other work in like manner that is or may be necessary to complete the grounds or mill, such as digging race, walling the same, digging the mill pit and walling the same, and securing anything connected with mill or machinery, so that the entire mill and all the parts connected therewith may be substantial and permanent, and all parts connected with machinery, and all machinery put in complete running order, ready to start to business in a permanent manner. Now, it is agreed that after each party has performed his portion of the con-

tract, as herein stipulated, that the said mill, mill site, and all the land belonging to the mill tract, not to exceed 160 acres, shall be owned and held jointly, each party being entitled to one undivided half interest of mill, mill-site, land, and that all expenses in perfecting title to land shall be borne equally and jointly. It is further agreed that after the completion of this mill, as per terms of this contract, that said Drew, on his part, should leave unpaid for labor or material furnished, that may have been used in mill, or in construction with said enter-
93 prise, that his interest shall be held liable for all such debts until the same shall be satisfied by such Drew.

A. J. DAVIS.
W. H. DREW.

BOZEMAN, *July 30th*, 1872.

Endorsement on the above:

Received for record November 17th, 1873, at 8 a. m., and recorded in Vol. I of deeds, at page 387. Fees $2.50.

[COUNTY SEAL.] ARCH. GRAHAM, *Recorder*.

Filed Nov. 1st, 1877. Theo. Muffly, clerk.

Complaint.

In the district court, first judicial district, Territory of Montana, county of Gallatin.

A. J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS, DEFENDANT.

The plaintiff complains of the above-named defendant, and alleges:

That heretofore, to wit, on the 14th day of November, 1873, at the county of Gallatin, in the Territory of Montana, the said plaintiff was the owner and in the possession of an undivided half of a certain
94 flouring mill situated on Willow Creek, in said county and Territory. That on the day and date last aforesaid the said plaintiff, by contract in writing, leased the said undivided half of said mill and premises to the said defendant for the period of one year from said date, which said written contract was duly signed by said defendant; that by the terms of said contract the said defendant, in consideration of said lease, undertook, promised, and agreed to pay and deliver to said plaintiff the one-fourth of the gross earnings of the said mill and premises, including wheat, bran, and screanings, that the said defendant, under said contract, took possession of said half of said mill and premises, and has used and occupied the same from said 14th day of November, A. D. 1873, until the present time. That the gross earnings of said mill and premises during the time aforesaid are and have been, in grain, flour, bran, shorts, and screanings, of the value of ten thousand dollars. That one-fourth of the said gross earnings of said mill are and have been of the value of two thousand five hundred dollars, that the the said one-fourth of the gross earnings of said mill are now due to plaintiff; that heretofore, to wit, on the 5th day of March,
95 1875, at the said county of Gallatin, the said plaintiff demanded from the said defendant the payment and delivery to him of the said one-fourth of the earnings (gross) of said mill as aforesaid, but to pay or deliver the same or any part thereof, the said defendant has wholly failed, and still fails and refuses to pay or deliver the same

or any part thereof, and that the whole of said ¼ of said gross earnings is now due and remains unpaid.

Wherefore the plaintiff prays judgment against the said defendant for said sum of twenty-five hundred dollars and costs of suit.

TH. R. EDWARDS,
Att'y for Plaintiff.

A. J. Davis, the above-named plaintiff, makes oath and says that he has heard read the foregoing complaint, and that the facts as therein stated are true of his own knowledge.

A. J. DAVIS.

Sworn to before me, this the 6th day of March, 1875.

W. F. DAVIS, *Clerk.*

Summons.

In the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin.

A. J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS, DEFENDANT.

Action brought in the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin, and said complaint filed in said county of Gallatin in the office of the clerk of said district court.

The people of the Territory of Montana send greeting to W. A. Fredericks, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin, and answer to the complaint filed herein, within ten days (exclusively of the day of service) after the service on you of this summons, if served within this county, or if served out of this county, but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to recover the sum of twenty-five hundred dollars for money due for rent on premises, and you are hereby
97 notified that if you fail to appear and answer the said complaint as above required the said plaintiff will take judgment by default against you for the relief demanded in his said complaint.

Given under my hand and the seal of the district court of the first judicial district of the Territory of Montana, in and for the said county of Gallatin, this sixth day of March, in the year of our Lord one thousand eight hundred and seventy-five.

W. F. DAVIS, *Clerk.*

Affidavit.

Dist. court of 1st judicial district, Gallatin County and Montana Territory.

A. J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS, DEFENDANT.

A. J. Davis, the above-named plaintiff, makes oath and says tha

the defendant is justly indebted to the plaintiff in the sum of twenty-five hundred dollars upon an express contract for the payment of money now due, and which is not secured by any mortgage or
98 pledge upon real or personal property; said indebtedness is based upon a written promise to pay rent for the use and occupation of certain mill property upon Willow Creek, in said county and Territory.

A. J. DAVIS.

Subscribed and sworn to before me, this 6th day of March, 1875.
W. F. DAVIS, *Clerk.*

Writ of attachment.

In the district court of the 1st judicial district of the Territory of Montana, in and for the county of Gallatin.

A. J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS, DEFENDANT.

The people of the Territory of Montana to the sheriff of the county of Gallatin, greeting:

Whereas the above-entitled action was commenced in the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin, by the plaintiff in the said action, to recover from the defendant, W. A. Fredericks, in the said action, the sum of $2,500.00 dollars, lawful money of the United States, besides interest, at the rate of per cent. per from the day of , A. D. 187 , and costs of suit; and the necessary affidavit and under-
99 taking herein having been filed as required by law: Now, therefore, we do command you, the said sheriff, that you attach and safely keep all the property of the said defendant, W. A. Fredericks, within your said county not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand as above mentioned, unless the said defendant give you security, by an undertaking of at least two sufficient securities, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking; and hereof make due and legal service and return.

SEAL OF THE GALL. DIST. COURT OF M. T. Witness Hon. F. G. Servis, judge of the said district court of the first judicial district, this 6th day of March, A. D. 1875. Attest my hand and the seal of said court, the day and year last above written.

W. F. DAVIS, *Clerk.*

Sheriff's return.

I, C. L. Clark, sheriff of Gallatin County, Montana Territory, hereby certify and return that, by virtue of the writ of attachment
100 hereunto appended, I did, on the 8th day of March, 1875, levy upon, as the property of the said defendant, W. A. Fredericks, the following property, to wit:

The one equal and undivided half of the Willow Creek grist or flouring mill, situate on Willow Creek, on section number seven (7),

township numbered one (1) south, of range numbered one (1) east, of the lands granted to the North. Pacific Railroad Company by the United States, together with the equal one-half of all and singular the tenements, hereditaments, and appurtenances, as well as the one-half of all the mill-dams, races, flumes, fixtures, and machinery thereunto belonging or in any wise appertaining; also 498 sacks of flour; a quantity of wheat, bran, shorts; and all the tools and other property in the building claimed or owned by the said defendant; also a pile of lumber, 500 feet, more or less, lying close to the mill; also the frame dwelling house situate and being in Gallatin City, Gallatin County, together with the land upon which said house is situated; and the log house occupied by J. H. D. Street; and all other improvements upon said land claimed and owned by said defendant, W. A. Fredericks.

101 Witness my hand, this the 9th day of March, A. D. 1875.

(Signed) C. L. CLARK, *Sheriff.*

List of property attached by virtue of the writ of attachment hereunto appended: One blacksmith forge, one bellows, one anvil, one vice, two screw plates, hammers, tongs, coal, chisels, one hand-saw, blacksmith chest, one diamond plow, thirty bushels of charcoal, more or less, one lot of horseshoes (new), and lot of iron, and one dirt scraper.

Witness my hand, this the 20th day of March, 1875.

C. L. CLARK,
Sheriff of Gallatin County, M. T.

Complaint.

In the district court, 1st judicial dist., Gall. Co., M. T.

TERRITORY OF MONTANA,
County of Gallatin:

ANDREW J. DAVIS, PLAINTIFF,
vs.
WELLINGTON A. FREDERICKS AND WILLIAM H. DREW, defendants.

Plaintiff complains of the above-named defendants, and alleges:

That heretofore, to wit, on the 12th day of March, A. D. 1868, at the county of Gallatin, in the Territory of Montana, the said defendants made, executed, and delivered to plaintiff their certain

102 promissory note, which is in the words and figures following, to wit:

GALLATIN CITY, M. T., *M'ch* 12, 1868.

27½ oz., 5 pwts., & 14 grs.

On or before the 1st day of July next, we or either of us promise to pay to A. J. Davis the sum of (27½ oz.) twenty-seven and a half ounces, 5 pennyweights, and (14 grs.) fourteen grains of gold dust, bearing interest at the rate of five per cent. per month from date until paid, for value received of him, this 12th day of March, A. D. 1868.

(Signed) W. A. FREDERICKS.
" W. H. DREW.

Whereby the said defendants undertook, promised, and agreed to pay plaintiff, on or before the first day of July, 1868, the said sum of

27½ ozs., 5 pwts. and 14 grains of gold dust, with interest thereon from date until paid at the rate of five per cent. per month, for value received; that at the maturity of said promissory note the gold dust due thereon was of the value of twenty-five dollars per ounce; plaintiff avers that at divers times prior to the bringing of this suit in the said Ter-
103 ritory of Montana, and particularly in the month of December, A. D. 1874, at said county of Gallatin, in the Territory aforesaid, the said plaintiff demanded from the said defendants the payment and delivery to him of the gold dust due on said note, with interest, but to pay the same or any part thereof the said defendants then and there failed and refused, and still fail and refuse to pay the same. That there is due now and unpaid on said note, including interest, the sum of thirty-five hundred and seventy-two dollars, for which sum and for costs of suit plaintiff prays judgment.

TH. R. EDWARDS,
Att'y for Plaintiff.

A. J. Davis, above-named plaintiff, makes oath and says that he has heard read the foregoing complaint, and that the facts as therein stated are true of his own knowledge.

A. J. DAVIS.

Sworn to before me, this 6th day of March, 1875.

W. F. DAVIS, *Clerk.*

Summons.

In the district court of the first judicial district of the Territory of Montana, in & for the county of Gallatin.

A. J. DAVIS, PLAINTIFF,
versus
104 W. A. FREDERICKS AND W. H. DREW,
defendants.

Action brought in the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin, and the complaint filed in said county of Gallatin, in the office of the clerk of said district court.

The people of the Territory of Montana send greeting to W. A. Fredericks and W. H. Drew, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin, and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or if served out of this county, but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

This action is brought to recover of said defendant the sum of three thousand five hundred and seventy-two dollars upon a promissory note executed to plaintiff by said defendants, W. A. Fredericks
105 and W. H. Drew, dated March 12th, 1868, drawing interest at the rate of five per cent. per month, and given for twenty-seven and one-half ounces, five pennyweights, and eighteen grains of gold dust; and you are hereby notified that if you fail to appear and answer

the said complaint as above required the said plaintiff will take judgment by default against you for the relief demanded in his said complaint.

Given under my hand and the seal of the district court of the first judicial district of the Territory of Montana, in and for the said county of Gallatin, the sixth day of March, in the year of our Lord one thousand eight hundred and seventy-five.

{SEAL OF DIST. C'T 1ST JUD. DISTRICT, GALLATIN COUNTY, MONTANA TERRITORY.} W. F. DAVIS, *Clerk.*

Affidavit.

In the district court of the 1st judicial district, Gallatin County, Montana Territory.

A. J. DAVIS, PLAINTIFF, *vs.* W. A. FREDERICKS AND W. H. DREW, DEFENDANTS.

A. J. Davis, the above-named plaintiff, makes oath and says
106 that defendants are justly indebted to him upon express contract for the payment of money now due, and which is not secured by a mortgage, lien, or pledge upon real or personal property. Said indebtedness is based upon a promissory note for the payment of gold dust, and interest at the rate of five per cent. per month from date of said note until paid.

A. J. DAVIS.

Subscribed and sworn to before me, this March 6th, A. D. 1875.
W. F. DAVIS, *Clerk.*

Writ of attachment.

In the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin.

A. J. DAVIS, PLAINTIFF, *vs.* W. A. FREDERICKS AND W. H. DREW, DEFENDANTS. } Writ of attachment.

The people of the Territory of Montana to the sheriff of the county of Gallatin, greeting:

Whereas the above-entitled action was commenced in the district court of the first judicial district of the Territory of Montana, in and for the said county of Gallatin, by the plaintiff in said action, to recover from the defendants, W. A. Fredericks and W. H. Drew, in the said action the sum of ($3,572.00) dollars, lawful money of the
107 United States, besides interest at the rate of per cent. per , from the day of , A. D. 187 , and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law: Now we do, therefore, command you, the said sheriff, that you attach and safely keep all the property of said defendants, Fredericks and Drew, within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said

plaintiff's demands as above mentioned, unless the said defendants give you security, by an undertaking of at least two sufficient securities, in an amount sufficient to satisfy such demand, besides costs, in an amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking; and hereof make due and legal service and return.

Witness Hon. F. G. Servis, judge of the said district court of the first judicial district, this sixth day of March, A. D. 1875.

Attest my hand and the seal of said court, the day and year last above written.

W. F. DAVIS, *Clerk.*

Sheriff's return.

I, C. L. Clark, sheriff of Gallatin County, Montana Territory,
108 hereby certify and return that by virtue of the writ of attachment hereunto appended I did, on the 8th day of March, 1875, in Gallatin County, levy upon as the property of the said defendant W. A. Fredericks the following-described property, to wit: The one equal and undivided half of the Willow Creek grist or flouring mill, situated on Willow Creek, on section numbered seven (7), township numbered one (1) south, of range numbered one (1) east, of the lands granted to the North Pacific Railroad Company by the United States, together with the equal one-half of all and singular the tenements, hereditaments, and appurtenances, as well as the one-half of all the mill-dams, races, flumes, fixtures, and machinery thereunto belonging or in any wise appertaining; also 498 sacks flour, a quantity of wheat, shorts, bran, and all the tools and other property in the building, claimed and owned by the said defendant; also 500 feet lumber lying close to the mill; also the frame dwelling-house, situated and being in Gallatin City, Gallatin County, together with the lands upon which house is situated, and the log house now occupied by J. H. D. Street, in Gallatin City, and all other improvements upon said land, claimed and owned by said defendant W. A. Fredericks.

109 Witness my hand this 9th day of March, A. D. 1875.

C. L. CLARK,
Sheriff.

Defendants next offered in evidence letters from Wellington A. Fredericks to the defendant Davis, the hand writing and signatures are admitted to be genuine, which are numbered from (1) one to eighteen (18), inclusive, all numbered in red ink; which said letters, from one to eighteen, inclusive, are in words and figures following, to wit:

GALLATIN CITY, *May 8th*, 1872.

Mr. A. J. DAVIS:

D'R SIR: I have made up my mind to build the mill on Willow Creek. I want you to fetch bolting cloth for 2 reels, 20 feet long, 36 in. diameter, 6 ribs; it wants No. 10 and 11 for the first reel, No. 9 and 10 for the other. I think you have No. 9 enough for ½ of one reel, and fetch one oats' separator and 1 smut mill. I think the California smut mill is the best. You had better get No. 2 machine. I will want 1 run of mill stones. I would rather have 3½ feet stones, but if you are going to fetch out your old mill burs one of them will answer. I would like to know the length of the spindle so as I can fetch a
110 proof-staff and some mill picks, the balance we can get up here. I

will want a lot of 4-inch leather belting. No news of importance. Sarah and the babies is well, and sends respects. Please write soon.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *Sep.* 28, 1872.

A. J. DAVIS.

D'R SIR: I have been home all of this week, a rigging up the 4-horse team; will start up to the mill Wednesday or Thursday next; expect to come back by Sunday next with a load of flooring for the house. I think I can fetch enough at one load to lay the lower floors; so, if I can get harness, I will have the lumber down next Sunday. If you have a harness that you can spare, I wish you would send it out. Mr. Galen has some harness here for sale. I was in hopes you could come down this last week. I want to see you in regard to the mill. Drew don't want to go on with his interest, and said he would buy my interest in the saw-mill if I would take my pay in lumber. I have got the mill all framed, and am waiting for teams to move it, but everybody is so busy stacking their grain, that I have been unable to get any of it
111 hauled yet, but I may get some teams soon. Money matters has been so close, that Drew has not been able to send you as much as he expected. He wanted to know if you would wait on him until he could collect; if not, he would have to hire it. J. S. Wilson is waiting to see you in regard to the old mill case. He has failed with his settlement with Thomas. I will expect you up soon.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *October* 16.

A. J. DAVIS.

D'R SIR: I have just returned from the mill with a load of lumber for Willow Creek. Drew says he has not done as well as he expected, and money is so scarce that it is impossible for him to go on with the grist mill, and wants me to take it off his hands, and I don't see how I can put it up this winter alone. What do you think is best to do with it? If you say stop until spring, all right; or if you say go on, I will do all I can with it; or if you want Drew's interest, you can have it. The frame is all ready to raise, and the tools are all ready, and about all of the lumber is out, ready to move. I have got flooring enough here to lay all of the bottom floors in this house, and *map* boards;
112 and if I had the glass and putty and door-hangings, I would get it inclosed. Judge Murphy wants to rent the old house. Answer soon. I will be home Sunday again.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *Oct.* 21, 1872.

A. J. DAVIS.

D'R SIR: Yours of the 18th is at hand. I would say, in answer, that I feel determined to go ahead with the mill as fast as I can. It has got to go up. Drew says if he hadn't to pay you that thousand dollars, that he could go on with it, but it is going to crowd him very much to pay you. He said that he was willing to go on with the mill as fast as he can after he pays you; and if I wait for that, it will be next year before he will get around. If I had about one thousand dollars, I think

I could get it about ready to start. I am getting it down as fast as I can. I have got all of the lumber here for the house, and will set it up on the land soon. The time is out on the land, and can be entered as soon as I can get the house up. As for Drew, I don't feel like waiting on him any longer, if there is any other way to go on. He is
113 willing that I shall take the lumber and timber that is got out for the mill, and he will take as much more. I expect I could get another party to take Drew's interest, but I don't want any more partners. The farmers say they will hold as much of their wheat as they can, and if it is not gone on with this winter, we will loose all of this crop. Drew has offered me 75 thousand feet of lumber for my interest in the saw-mill. If I get a chance to sell Coley & Belley and Sam'l Billey, harness, and wagon and take it in *hallns* lumber, is it best or not? I shall start for the mill in the morning. If it was not for the grist-mill, I would come up and help you this winter. If I can make a bargain with Drew for the saw-mill, I believe I will let it go.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *Dec.* 11*th*, 1872.

A. J. DAVIS.

D'R SIR: I have been upon Willow to-day; seen a number of the men. They say if I will go ahead with the mill this winter, they will turn out and dig the mill-pit and race and the dam free of charge. I have not given them any answer yet. What do you think about
114 it? Is the mill-stones and smut-mill come yet? I will go to Bozeman to-morrow for a load of lumber; will be home Saturday; would like to hear from you. When I come back, I think I can get two or three carpenters, and pay them in lumber. The worst that would be is in regard grub. I think I can start it in two months after the foundation is laid. If it is put up, it will get all of the wheat on Willow and Lower Willow. They are gon' on Thomas. He about says to Drew, anything to start the mill. Let me know what you think about it.

Y'rs, truly,

W. A. FREDERICKS.

GALLATIN CITY, *Oct.* 28, 1872.

A. J. FREDERICKS (DAVIS?)

I received your letter yesterday. I shall start to-morrow for Bozeman for a load of lumber and then return to Willow Creek; then to Sterling to get a load of your iron. I will be back here from Sterling about next Saturday; I am very buisy in getting the timber down for the mill, but it is getting so late I am afraid I won't get it up this winter. I will come up next week with your load, if nothing happens, and then we will talk the matter over and see what is best to do about matters in general; do you want that band iron in the shop; may be you had better
115 write and tell me what you will need the most. I don't know how I shall manage about money for expenses. I never saw such times to raise money, and I am strapped.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *September* 2, 1872.

MR. A. J. DAVIS:

D'R SIR: I have received 2 letters from you since I went up to the

mill. I came down home yesterday to see you here. I want to make some more inquiries about that water, what has it got, and in *at* case around the wheel timber to the left, what with the gates in it, or has it got to be put in a wooden scrale. I want to frame the decker to hold the wheel this week. I am somewhat lost to know the power and the speed of that wheel; I have nothing to go by but level book, and I don't think it has the same speed nor power as the lefel wheel; if you can find out anything different from lefel conclusion, let me know, as I want to get my other granary up as soon as possible; give me the size of your fling gudgeon for bolt-shaft and convey *our* shaft. I think you have a pattern that will take a 6½ inch wood, which will be about right. I
116 would like to know the size of your bevel wheels patterns, and I may arrange the machine to suit the patterns. I shall get ready to move down on Willow Creek in 15 days. I want to raise all the teams next week I can. I would like to use Belley and Colley on the *am* if you don't need them. Have you got any patterns for a *ve* friction wheel about 2 feet in diameter. I am sorry Mr. Drew has failed to get you that money. As soon as he told you they had bad luck and broke the big band wheel, which has been a great drawback; he is going to make a draw on government to-day for you. Please answer to Bozeman.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *December 22d*, 1872.

A. J. DAVIS:

D'R SIR: I have received two letters more from you of late. I have just returned home; the weather is very cold and stormy here. I have got all of my lumber away from the mill that is sawed out, and Mr. Wright has agreed to hall that as soon as it is cut out. I have about 5,000 feet at Foster's to be dressed, but he is froze up, and I don't know whether I will get that or not. I have 4 loads here to take over on Willow Creek. The weather is very cold and if it continues cold I
117 don't think it is best to do anything towards building the mill this winter. I don't that the parties on Willow Creek will bind themselves to do anything, and if they don't, I shan't do anything this winter. I will know more about it when I go upon Willow again. I don't think Drew intends to have anything to do with the mill than he can help. I have not said anything to him of late about the matter. I have got 35,000 feet of lumber on the way and there, for the mill, and there is about 6,000 feet more to deliver. I have not had time to go and see the men that is owing you, but will see them soon. If the weather is not too stormy, I think I can get ready to come over in about two or three weeks from now. If the weather is cold you can't finish your house. It won't make any difference with us. You can use your old office.

Yours, truly,

W. A. FREDERICKS.

I was over to-day and saw Bangs Well; he said that he had sold 2 cows, and the money was due the first of January, and he would send it as soon as he could; he has not threshed any of his grain yet; the roads have drifted very bad this morning; it has stopped the stages.

GALLATIN CITY, *July 8th*, 1873.

A. J. DAVIS:

118 D'R SIR: I received your letter dated the 2nd. I got those

notices and have put them up. I have just come from the saw-mill. Everything is going on very well well there, except there is no money to buy lumber. Drew says it is impossible to sell lumber and get money; he says that he is sure that he will get a bill of government. He is going to send me 2 mechanics in a few days. I have got 4 teams to start next Monday after lumber; in 3 weeks I will have all of my lumber down. I have got the mill raised, and I think half of the dam is in. Drew says the same about the mill as he did last winter; he don't want any interest in the grist-mill, but will help me all that is in his power.

I want you to send from Clark, Conrad and Curtin one keg of 10^{d} nails; 50 lbs. 5 in. spikes; 30 lbs. No. 6 nails; 20 lbs. No. 4 nails; 50 lbs. 5 in. spikes; 30 lbs. No. ; 1 gross of 1½ in. wood screws; 1 gross 2 in. screws. Send five gallons syrup. There will be a team call at Conrad's for it next Friday. You can get all of the belt-gearing *dody* and the 3 upper lengths of the upright shafting, and leave the lower lengths until the water-wheel comes. You can get the spindle and step, and the stones ready, and send all of the gudgeons for the conveyance and bolts shafts soon. I shall need the gudgeons in
119 3 or 4 weeks. I think I shall make some changes in the shafting in the lower story of the mill, but not until I get the water-wheel down, and that I don't expect for 2 weeks yet.

Yours truly,

W. A. FREDERICKS.

GALLATIN CITY, *September 22d*, 1873.

A. J. DAVIS:

D'R SIR: I received yours of the 8th to-day. You did not say anything about shipping any of that machinery. I am ready to use it all, and I want you to ship it as soon as possible. I have got 5 men at work, and can't work but a few days longer without the balance of the machinery. I expect to get it ready to run the last of October. Do you want Mood to start the mill, if he can be got. John Emmerson is here and can be got. I wrote you some 2 weeks ago about the elevator belts; they should be 4½ in. wide or 5 inches, to use those elevator-cups, and I can't put up my elevator-spouts until I know the width of the belt. I sent Mr. Simon the affidavit some time since. Write by return mail. If I can raise the money I would like to come in and have that land entered.

Yours truly,

W. A. FREDERICKS.

WILLOW CREEK, *September 7th*, 1873.

A. J. DAVIS:

120 D'R SIR: I will give you the bill of bolting: 250 feet 5 inches wide, leather, or 4½ in. wood*d*en; this bill is for elevators. Please let me know which you will send—let me know soon. 46 feet 3 in., 12 in. wide. This is the stone belt; if you have a No. 1 leather belt you can send it; if not, send gum. 36 ft. 6 or 10 in. wide; this is to drive the upright bin shafting. This will do as well to be leather or gum. 14 feet, 10 in. wide, other, 18 ft., 6 in. wide, other, ten feet, 4 in. wide leather, ½ side string leather; 2 gro. 2½ copper riv*i*ts ⅜ in. long; 1 gro. 2½ in. wood screws; 2 dozen wood-screw bolts, ⅜ di., 4 in. long; 1 dozen do., ½ in. diameter, 6 in. long. You may send all of the machinery as soon as you can. The mill is inclosed, and half of the floors are laid, and a

part of the band-wheels are made. I shall have the water-wheel in this week. I have 2 men now; will have 2 more next week, Tuesday, and shall need everything that belongs to the machinery soon. Send 110 elevator cups.

Yours truly,

W. A. FREDERICKS.

Please tell Clark, Conrad, and Curtin to send me 50 pounds 10^{d} nails, and 50 lbs. 8-penny nails. Send it with one of the first teams that you send out with the machinery. Don't forget to send that piece of galvanized iron to make the stone-curl, 14 feet long, 3 in. wide' than the eye of the stone is deep.

121 WILLOW CREEK, *26th*, 1873.

A. J. DAVIS:

D'R SIR: I received your letter to-day. You said nothing about that 2 shoes and the bolt of clothing that was on the bill of the last load, and did not come here. Dunphy has paid the men on your letter and they have gone to Corinne. I wrote them a letter at Bozeman; I supposed they would come back for their *becet;* it is possible that you did not send the bolt-cloth that was not made the 2 shares. I don't miss it; must be a mistake in making out the bill; if you have not sent the bolt cloth, I wish you would do so. I can make it up. In examining the roll I see you have not sent any coarse screening for the tail-end of the reel. You will have to send another piece 12 feet long, 16-in. wide. You may send the big belt for the stone. I may have to grind the burs down with sand and will not do it until I get the belt. Send a piece of string leather; I can't get it here. You did not say anything about a mill scales; do you expect to furnish them, or how are they to be got, and the mill has got to have a stove and pipe, which I expect the mill will have to get. I got an answer from Mood; he was to come down to-day,
122 but did not come. I don't expect I can make a bargain with him; he will want 6 or 7 dollars a day, and that is more than the mill can earn the way flour is selling. I can get Emmerson for about one-half that Mood will come for; the farmers in general think Emmerson is as good a miller as Mood, and he wants two-thirds of the tail end. I expect Mood will want all, and that won't do. Give me your opinion on the two men. I think if Mood don't come down this week I will let Emmerson go to work on the burs. In regard to your interest I will think of it, and see what I can do. I want to ask you a question: If I settle up my matters with Drew and get the other half of this mill, will you consent to the trade? Now, I have done all that has been done here this summer, and if I had not the way I have, there would have been nothing done. I have worked very hard to get the mill a going, and have had no help from anybody, only the men that Drew sent down, and I expect to pay these, and if you will consent to exchange Drew for me I think I can make the exchange. I don't wan't any trouble on this mill, and I hope it will be all straightened up without any fuss.

W. A. FREDERICKS.

BOZEMAN, *March the 28th*, 1874.

Mr. A. J. DAVIS:

123 D'R SIR: I received a letter from you some ten days ago, and you say you had not been over to Willow Creek yet, and did not say whether the mill was finished or not. I would like to know if Fredericks can hold me responsible for his debts that he owes on the mill,

as his wife agreed to pay all of them; if they can, I can make myself safe on some of it. I would like to know what to do. I look to you for advice, for I don't want to pay any more debts of the mill, for I will have all I can do to pay your debt this season. Fred's wife wants me to give her another deed from what I have given. I don't know what it is yet. I will let you know what it is, or will it do to take Edwards' advice on it? If you say that Edwards will do, I will let it go at that. Have you and Fredericks had any trouble about the mill? I have not heard of any, but I thought so by her wanting another deed. I wish you would keep me posted as well as you can, so as I won't get into any trouble. I am cutting logs now so as to have them ready as soon as the water comes, and I am not contracting anything only to pay it in lumber so as I can have the avails of the lumber to pay to you. I will write you again as soon as I find out what Mrs. Fredericks wants, and I would like to have you let me know what to do, as soon as you get
124 my letter. I am at the mill most of the time and don't get a chance to come down once a week.

Yours, truly,

W. H. DREW.

MIDDLE CREEK MILLS, *June 17th*, 1873.

Mr. A. J. DAVIS,

D'R SIR: I wrote you some time ago that I would send you some money the first of this month, which was impossible to do. I have been compelled to be at the mill for the last three weeks. The water has been so high it took away my boom, and I lost some 3 or 4 hundred logs, and I had to go below the mill and make another and run in what logs I had banked, then I got another boom ready above the mill and then went down so that I got it in and run in a lot of logs; it dam'ed the creek up so that it run all over around the mill, and I had to watch it night and day, and the creek is falling to-day, and it will take me several days to turn the water out of the road and put one span on my bridge. The mill hasn't run any for three weeks on the account of high water; the creek raised two feet higher this spring than last year. I will have as many logs as I can saw this summer, and it won't cost me more than eight dollars to get the lumber delivered in the yard, and I don't have to pay any money only as lumber is sold for the cash, for any work done. I got a letter from the post to-day to know
125 what I will furnish all the lumber, lath, and shingles for that they may want this summer. I will see them in a few days. As for the grist-mill, I will send as many men as Fredericks says he can use to advantage, as soon as the water goes down so as they can work to advantage. I am as anxious to get the mill started as you are, and am ready to furnish hands or material that is needed. That matter I have looked to Fredericks to see to, and stand ready to fill his orders at any time, but it is necessary for me to attend to the saw-mill in order to be able to pay the expenses between us both. I hope we will be able to get the mill running as soon as you could expect it.

I see by your letter that you think that I do not appreciate your extended favors, which you are very much mistaken; it is my opinion that from the first start that you wanted to help Fredericks and myself get a little start through your kindness. I am satisfied that we will have completed that we have undertaken by the fifteenth of September next. I am very sorry that I have not been able to have paid that note. I know it is right and just that it should have been paid long ago, and I assure you that I am much obliged to you for waiting

126 on me, but I think I will soon be able to settle it up; it has made a great difference with me on the account of the post not using any lumber; the old buildings have all been condemned, and they expect to commence the first of July to build new quarters; if they do, it will require a good deal of lumber, and I am prepared to turn out three thousand feet a day for three months. I am in hopes that I will be able to straighten up things in a short time to your satisfaction.

Yours, truly,

W. H. DREW.

BOZEMAN, *May 1st*, 1874.

Mr. A. J. DAVIS:

D'R SIR: I have just received your letter stating you had been to Willow Creek, but did not find things all right. I wrote to Fred. some time ago about the dam, if it was done, and he wrote me he would have it done by the tenth of May, so as to be sure of high water. As for the balance of the mill, I supposed it was finished. I will write to him and see what he says about it. I am sorry that you did not find your toll all right. I hope there won't be any trouble until you accept of the mill from me. I don't want that woman to make mischief between us. I got to write about those cattle some ten days ago, but have not got any answer yet. I sent my boy over to see him this week, but he has not come back yet. I have paid Edwards fifteen dol-
127 lars. I told him I would pay him the balance as soon as I possibly could get it all. He said he would like it as soon as he could get it. How would you like to trade that note of mine for Fred's interest in the mill or their homestead. I don't know but I could make a trade. I could find out if it would suit you. You spoke of some material being furnished. I would like to have you send me your bill of anything you have furnished that you have against me, so as I may know what to do with Fred., as I settled up all other accounts with you when I was there. The weather has been so bad and men so scarce, I have not started sawing yet. I would like it if you could make a trade for the mill, as it would then avoid all trouble. As for that woman, you know what she is better than I do. As for Fred., he works hard, and if he was in business by himself it would be better. I will write as soon as I hear from Fred.

W. H. DREW.

HAMILTON, *August the 20th*, 1874.

Mr. A. J. DAVIS:

D'R SIR: It has been a long time since I wrote to you. Money is so hard to get that I have not been able to sell anything to get much to send you. I sold ten head of cows to Grannis, and he was to
128 send you the money; and I sold one to-day, and I will send the money when I go to Bozeman. I have quit the mill to cut my grain. I will have enough for bread and seed; it will take about ten days, if it don't rain too much. I have been in hopes that the Jefferson mills would make a market for lumber, but it hain't yet, and I don't see anything that will turn into money this fall. I have not seen Fredericks since you wrote me, but I heard he had the dam up and was running. I wrote to him to give every man a receipt for every lot of grain that was brought into the mill, so as it would agree with the books at the mill. I will go over and see how he is getting along before I go up to the mill again, and will let you know. Now, I would like to

know what you will do with my mortgage—if you will give me more time, and how long. How much lumber would you take, delivered in Bozeman, this fall and next spring, and how much wheat, delivered at the Willow Creek mill, next fall and a year from next fall? If you can give me until next fall, I want to rent out a part of the ranch to put into wheat, and I would like to know right off; or if you don't, and I can rent it out and let the rent go to whoever owns the rent when
129 the grain comes off. I wish you would write soon, and so as I can get to know what I am to do before I go over to the mill; and if there is anything you want I should do about the mill on Willow Creek let me know. Has Fred. paid any of the indebtedness upon the mill this summer?

Yours, truly,

W. H. DREW.

BOZEMAN, *May the 30th*, 1874.

Mr. A. J. DAVIS:

D'R SIR: I received two letters from you to-day stating that you did not feel willing to accom'odate with that amount of money that I asked for, on the account of the security that you had would not warrant it. It is all right, and, further, you will see that I will try to do what is right. Grannis has not come back yet—the man I let have the beef cattle; he was to have been back the 20th of this month. I did not see him. My son sold them to him on the Yellowstone. I told him to sell them at the Mission, but he was one day too late. I found six cows after I gave you the mortgage, and I sold four of them to Grannis for my own use; all the balance is here, except one steer that strayed, but I will try to find him. Grannis said to my son; that when he came back he wanted to buy all of my cows, and I will try
130 and sell to him all of the cattle; if so, I think I can raise 1,000 dollars. I see that you thought that Edwards was not looking after matters, but I told him how it was; he see that I had not molested any of the stock I had turned out. As for that deed of Mrs. Fredericks, I may have done wrong, but you knew how the first deed was, and the last one was worded the same as the first. I asked the recorder to write you a statement to let you know if there was any difference, and he said he would. You have said that Mrs. Fredericks said that I talked about you, and did not think that I would do what I had agreed to if I could help it. If Fred. and his wife will do what is right as near as I do, I will guarantee that there never will be any trouble. You had ought to know what she is by this time, and take her word for what it is worth. I hope this will be satisfactory to you, and that you will feel satisfied that I am not trying to do anything wrong in our matters of deal. As soon as Grannis comes back you will hear from me again.

Yours, truly,

W. H. DREW.

BOZEMAN, *May the 21st*, 1873.

Mr. A. J. DAVIS:

D'R SIR: I received your letter a few days ago, and I have neglected answering it on the account of my family being sick. I have had
131 to be with them the most of the time for three weeks. My wife and myself have had to sit up with them all the time, and they are not much better yet. I was very glad you answered that matter of

Mr. Perkins, for I could not get anything out of him, for he said he could make a turn with you. I don't think I can send you any money before the first of June. I am anxious to pay the balance of that note. I received a letter from Mr. Fredericks last week, that he was at work; he was at work at the mill. I see you are anxious to have it up. I believe that I have done everything that has been required of me. I have furnished what lumber he called for, and paid for hauling, and paid for carpenters to frame it; and the last letter that I got from Fredericks, at Helena was that he could not do anything more until July, as he did not think he could get a title to the land before then, and he would not do anything until he did. There is but very little doing here; just about enough to pay expenses. There is some talk of commencing work at the post soon, and then times will liven up a little. I have managed to pay my way this winter, so as to be ready to put up that mill as soon as it could be, for it has cost me a good deal,
132 and I don't want to be out of money any longer than I can help. What did that wheel cost?

Yours, truly,

W. H. DREW.

This court, sitting as a jury in said cause, proceeded after the close of the testimony to find the facts, which findings are in the words and figures following, to wit:

Findings of facts.

In the first judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

This cause coming on for trial this 30th day of October, A. D. 1877, before the court sitting without a jury, and a jury having been expressly waived by the parties plaintiff and defendant, and after the reading of the pleadings, the introduction of evidence, and argument of counsel, and the court being fully advised as to the law and the evidence appertaining to said cause, the court finds the facts in said cause, in writing and filed therein, and that *that* the plaintiff Sarah J. Fredericks was the owner of the property mentioned in the complaint
133 in said cause, as sole trader, and that the defendant Charles L. Clark did wrongfully take of said property, upon writs of attachments issued in said cause at the suits of defendant Andrew J. Davis vs. Wellington A. Fredericks, and Andrew J. Davis versus Wellington A. Fredericks and William H. Drew, from the possession of said plaintiff Sarah J. Fredericks two hundred and ninety-five sacks of flour, and that the value thereof was five dollars and fifty cents per sack, and one hundred and seven bushels of wheat of the value of two dollars per bushel, and of said shingles ten dollars in value, and of said lumber of the value of fifty dollars, in all of the value of eighteen hundred and ninety-six dollars and fifty cents.

The court further finds that said plaintiff Sarah J. Fredericks is entitled, as against said defendants Charles L. Clark and Andrew J.

Davis, to the possession of said property, or the value thereof, to wit, $1,896\frac{50}{100}$.

Now, on motion of Messrs. E. W. Toole and J. H. Shober, attorneys for said plaintiffs, it is ordered and adjudged by the court, that said plaintiff Sarah J. Fredericks do have and recover from said defendants Charles L. Clark and Andrew J. Davis the possession of said property hereinbefore described; and if possession thereof cannot be had,
134 then that said plaintiff do have and recover of said defendants the sum of one thousand eight hundred and ninety-six $\frac{50}{100}$ dollars, the value thereof, and her costs in this behalf expended, taxed at $374\frac{75}{100}$ *dollars;* and judgment is hereby rendered in favor of said plaintiff Sarah J. Fredericks, and against said defendants Charles L. Clark and Andrew J. Davis, for the possession of said two hundred and ninety-five sacks of flour, and said one hundred and seven bushels of wheat, and said shingles and lumber, in the pleadings herein described; and if delivery cannot be had, then that said plaintiff Sarah J. Fredericks do have and recover of said defendants the sum of eighteen hundred and ninety-six $\frac{50}{100}$ dollars, the value thereof, and the further sum of $374\frac{75}{100}$ *dollars*, her costs and disbursements in this case expended.

HENRY N. BLAKE,
Judge of said Court.

To which ruling, finding, decision, and judgment of the court the defendants then and there excepted, because the same is contrary to the evidence and against the weight thereof; and that the conclusions of law found therefrom are erroneous, not supported by the proof in said cause, or authorized by the facts so found by the court.

135 That at the same time the defendants submitted findings of facts to said court, and requested him to find in accordance therewith, which said findings are in words and figures following, to wit:

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

Defendants submit and ask the court to find the facts as follows:

1st. That plaintiffs are now and have been long prior to January 1st, 1869, husband and wife.

2nd. That on and prior to the said first day of January, A. D. 1869, the said Wellington A. Fredericks was wholly insolvent, and that his insolvency continues to this date.

3. That the said defendant and the said Wellington A. Fredericks had a demand against Ault & Co., who were the owners of a certain saw-mill situated in Gallatin County, Montana Territory. That for the purpose of securing the said indebtedness, the said Ault & Co. executed to the said A. J. Davis a mortgage on said saw-mill and fixtures. That said mortgage was foreclosed, and the said defendant Da-
136 vis became the purchaser thereof at sheriff's sale; that pursuant to said purchase the sheriff of said county executed to defendant Davis a deed for said mill, machinery, & fixtures, the one-half thereof belonging to said Wellington A. Fredericks.

4. That thereafter the said Davis sold his half interest in said mill,

&c., to one Wm. H. Drew, and executed to said Drew a deed for one-half; and at the request of the said Wellington A. Fredericks, and without any consideration, executed a deed to Sarah J. Fredericks for the other half of said saw-mill.

5. That on or about the year 1872 an agreement was entered into between said A. J. Davis, Wellington A. Fredericks, and the said William H. Drew to build and furnish that certain grist and flouring mill to be situated on Willow Creek, in said Gallatin County, and since known as the Willow Creek mills; by the terms of said agreement the said Davis was to furnish the machinery, and they, the said Drew and Fredericks, were to furnish the lumber and to put up the mill and mill-dam.

6. That in pursuance to said agreement the said mill was completed, and the said Davis became the owner of one-half, and the said Drew and W. A. Fredericks became the owners of the other half.

137 7. That in 1874 the said Fredericks exchanged his interest in said saw mill (the title then being held in the name of his said wife, Sarah J. Fredericks) to the said Drew for his (Drew's) interest in the said grist or flouring mill, and thereafter, without any other consideration, caused the said Wm. H. Drew to convey the one-half of said grist-mill or flouring-mill to the said Sarah J. Fredericks, his said wife as aforesaid.

8. That the said Wellington A. Fredericks has, since the completion of said mill in the winter of 1873, possessed, controlled, and managed the said mill.

9. That the flour and the other property attached by the sheriff in March and April, 1875, is the proceed of said mill.

10. That the said conveyance from the said Drew to the said Sarah J. Fredericks is without consideration and void as to the said defendant and other creditors of the said Wellington A. Fredericks, and was so made with the intent to hinder, delay, and defraud said Davis and other creditors.

11. That the flour and other property so attached as aforesaid is the property of the said W. A. Fredericks, and subject to the payment of his debts.

138 12. That the so-called sole tradership of the said Sarah J. Fredericks is and was a trick and device, the better to enable her to cover up and secrete the property of her said husband, and to hold the same thereunder in trust for his use and benefit.

The court refused to find any of the foregoing facts except the numbered 1st, which is incorporated in the finding duly signed.

HENRY N. BLAKE, *Judge.*

Which said findings were refused and rejected by said court. To the ruling of the court in refusing to find in accordance therewith these defendants at the time excepted.

That thereafter the said court, on the 1st day of November, 1877, proceeded to render judgment against these said defendants, which said judgment is in words and figures following, to wit:

Findings and judgment.

In 1st judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

139 This cause coming on for trial this 30th day of October, A. D. 1877, before the court sitting without a jury, and a jury having been expressly waived by the parties plaintiffs and defendants, and after reading of the pleadings, the introduction of evidence, and argument of counsel, and the court being fully advised as to the law and the evidence appertaining to said cause, the court finds the facts in said cause, in writing and filed therein, and that *that* the plaintiff Sarah J. Fredericks was the owner of the property mentioned in the complaint in said cause, as sole trader, and that the defendant Charles L. Clark did wrongfully take of said property, upon writs of attachment issued in said cause at the suits of defendant Andrew J. Davis vs. Wellington A. Fredericks, and Andrew J. Davis vs. Wellington A. Fredericks and William H. Drew, from the possession of said plaintiff Sarah J. Fredericks two hundred and ninety-five sacks of flour, and that the value thereof was five dollars and fifty cents per sack, and one hundred and seven bushels of wheat of the value of two dollars per bushel, and of said shingles ten dollars in value, and of said lumber of the value of fifty dollars, in all of the value of eighteen hundred and ninety-six dollars and fifty cents.

140 The court further finds that said plaintiff Sarah J. Fredericks is entitled, as against said defendants Charles L. Clark and Andrew J. Davis, to the possession of said property, or the value thereof, to wit, $1,896\frac{50}{100}$.

Now, on motion of Messrs. E. W. Toole and J. H. Shober, attorneys for said plaintiffs, it is ordered and adjudged by the court that said plaintiff Sarah J. Fredericks do have and recover from said defendants Charles L. Clark and Andrew J. Davis the possession of said property hereinbefore described; and if possession thereof cannot be had, then that said plaintiff do have and recover of said defendants the sum of one thousand eight hundred and ninety-six $\frac{50}{100}$ dollars, the value thereof, and her costs in this behalf expended, taxed at $\$374\frac{75}{100}$ *dollars* and judgment is hereby rendered in favor of said plaintiff Sarah J. Fredericks, and against said defendants Charles L. Clark and Andrew J. Davis, for the possession of said two hundred and ninety-five sacks of flour, and said one hundred and seven bushels of wheat, and said shingles and lumber, in the pleadings herein described; and if delivery cannot be had, then that said plaintiff Sarah J. Fredericks do have and recover of said defendants the sum of eighteen hundred and ninety-six $\frac{50}{100}$ dollars, the value thereof, and the further sum of $\$374\frac{75}{100}$ *dollars*,

141 her costs and disbursements in this case expended.

(To the rendering of the said judgment these defendants at the time duly excepted.)

(The court sustained objections to further questions of flour that was sold to Hall:

I had 160 sacks of flour as my toll in '75, and may be 20 sacks more. My toll amounted to this from April 1st, 1874, to March, 1875. I never

heretofore testified that from spring, '74, to spring of 1875 I sent 400 sacks of flour to Helena. I sent 50 sacks of flour to Hall during this time, and this was all I did send him during that time.)

That said plaintiffs next offered in evidence the judgment roll and records in the case of Sarah J. Fredericks and Wellington A. Fredericks vs. Andrew J. Davis and Caleb Gilbert, which said judgment roll and records of said cause are in words and figures following:

In the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin.

SARAH J. AND WELLINGTON A. FREDERICKS, plaintiffs,
vs.
ANDREW J. DAVIS AND CALEB GILBERT, defendants.

142 I, the undersigned, clerk of the district court of the first judicial district of said Territory, in and for said county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action, and recorded in judgment book 3 of said court, at page 381; and I further certify that the foregoing papers hereto annexed constitute the judgment roll in said action.

Witness my hand and the seal of the district court, this 19th day of May, A. D. 1877.

SEAL OF DIST. COURT, 1ST JUD. DIST., GALL. COUNTY, M. T.

THEO. MUFFLY, *Clerk*,
By AMIE J. MALIN,
Dep. Clerk.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS AND CALEB GILBERT AND Wellington A. Fredericks.

This cause came on regularly to be heard on trial, on the question of title and partition of the property mentioned in the complaint herein, this 14th day of May, A. D. 1877, E. W. Toole, esq., and J. H. Shober, esq., appearing as counsel for the plaintiff, and Messrs. Chumasero, Spratt, Woolfolk, Vivion, and Edwards for the defendant Andrew J. Davis; and a jury of twelve men having been regularly empannelled
143 and sworn in said cause, and the jury hearing the evidence, arguments of counsel for the respective parties, and the instructions of the court, retired under a sworn officer to deliberate on their verdict in said cause, and on the 16th day of May, A. D. 1877, the said jury returned their verdict in said cause, which is in the words and figures following, to wit:

Verdict.

In the district court of the first judicial district of Montana Territory, in and for the county of Gallatin.

SARAH J. FREDERICKS & WELLINGTON A. Fredericks, plaintiffs,
vs.
ANDREW J. DAVIS & CALEB GILBERT, defendants.

Issues submitted by the court for special verdict:

1. Who owned the property in controversy in this action at the time this action was commenced?

Answer. A. J. Davis and Sarah J. Fredericks.

2. What interest or share in said property was then owned by the plaintiff Sarah J. Fredericks?

Answer. One-half interest.

3. What interest or share in said property was then owned by the defendant Andrew J. Davis?

Answer. One-half interest.

144 4. What interest or share in said property was then owned by the defendant Caleb Gilbert?

Answer. Such interest as is specified by the mortgage.

5. What interest or share was then owned by Wellington A. Fredericks?

Answer. None.

E. M. DAVIDSON, *Foreman.*

Which said special findings and verdict is hereby approved by the court.

Now, on motion of Messrs. Toole & Shober, attorneys for plaintiff, it is ordered, adjudged, and decreed by the court that Sarah J. Fredericks is the sole owner, as of her own right, of an undivided one-half interest in and to the property mentioned in the complaint herein, and known and described as a certain flouring-mill, situate at the upper end of Lower Willow Creek Valley, on the northeast quarter of the southeast quarter of section seven (7), township one south, of range one, east, with all the tools, implements, water right, mill-dam, and all the appurtenances thereunto belonging, all in the county of Gallatin, Montana Territory; and that Andrew J. Davis is the owner of an undivided one-half interest in and to said property. And it is

145 further ordered, adjudged, and decreed that said Caleb Gilbert has a lien on said undivided interest of the plaintiff in this action, by virtue of a certain mortgage on said undivided interest, for the sum of four thousand dollars, which said lien attached to said property on the 22d day of June, A. D. 1874, which said amount bears legal interest from date. It is further ordered and adjudged by the court that a division of said property is impracticable, and cannot be had without injury to the parties interested. It is therefore ordered, adjudged, and decreed by the court that said property hereinbefore described be sold at public sale, as prescribed by law and the practice of the court, by the sheriff of Gallatin County, Montana Territory, who is hereby appointed referee to make such sale; that said sale be had at the front door of the court-house, at the town of Bozeman, in the county of Gallatin, Montana Territory, on the 22nd day of October, A. D. 1877, at one o'clock p. m., and that said property be sold to the highest bidder for cash in hand; that said sheriff and referee bring the money realized from the sale of said property into this court, and make due report of his proceedings in relation to the sale of said property; that the proceeds of said sale be applied under the direction of the court:

146 1. To the payment of the costs and disbursements incurred in this action.

2. The costs of said sale.

3. That the residue of the one-half interest of said Sarah J. Fredericks be applied in the said mortgage of the said Caleb Gilbert, and that the balance be paid over to the respective parties hereto, in accordance with their respective interests. And it is further ordered, adjudged, and decreed by the court that the said Sarah J. Fredericks have and recover of the said Andrew J. Davis her costs and disburse-

ments necessarily incurred in defending and establishing her right to the undivided interest in said property, contested in this cause by said Andrew J. Davis, taxed at one hundred and sixty and $\frac{80}{100}$ dollars.

Given under my hand, this 17th day of May, A. D. 1877.

HENRY N. BLAKE, *Judge.*

To the introduction of the same the said defendants objected, upon the ground of irrelevancy, and for the additional reasons that the said cause and the judgment rendered therein had been appealed to the supreme court of this Territory, the said cause as appealed not having been determined by said supreme court.

147 Incorporate all amendments filed Nov. 26, 1877, and allowed by me Dec. 7, 1877.

HENRY N. BLAKE, *Judge.*

And afterwards, to wit, on the 15th day of November, A. D. 1877, the said defendants filed in the office of the clerk of the said district court their bill of exceptions in this cause, which said bill of exceptions was then, by direction of the judge of said district court, filed as of the 26th day of November, A. D. 1877; which bill of exceptions is in the words and figures following, to wit:

Bill of exceptions.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
CHARLES L. CLARK, SHERIFF, &C., DEFENDANTS. } 132.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants. } 166.

Be it remembered that the said Sarah J. Fredericks having filed her amended complaint in this court against the above-named defendant Charles L. Clark, sheriff, &c., which said amended complaint is

148 in the words and figures following, to wit:

In 1st judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS, WITH WHOM IS ASSOCIATED Wellington A. Fredericks, her husband, as plaintiffs.
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

The plaintiff Sarah J. Fredericks, for amended complaint herein, by leave of the court first had and obtained, states:

1. That on the 8th day of March, A. D. 1875, she was, and for a long time previous thereto she had been, and now is, a married woman, and the wife of Wellington A. Fredericks, her coplaintiff above named. That on the 8th day of March, A. D. 1875, at the county of Gallatin and Territory of Montana, this plaintiff Sarah J. Fredericks was the

sole and exclusive owner and possessor in her own right, as sole trader, of the following goods and chattels, to wit: Two hundred and eighty-two sacks XXX (trible X) flour of the "Willow Creek Flouring Mill" make and brand, and one hundred and seven bushels of wheat, and five hundred feet of pine lumber; that said flour and wheat was
149 of the value of two thousand two hundred dollars, and said lumber was of the value of thirteen ($13.00) dollars.

3. That the defendants, on the 8th day of March, A. D. 1875, while this plaintiff was the sole and exclusive owner of said property at the said county of Gallatin and Territory of Montana, without this plaintiff's consent, did wrongfully and unlawfully take said goods and chattels from the possession of this plaintiff Sarah J. Fredericks.

4. That before the commencement of this suit, to wit, on the 31st day of March, A. D. 1875, this plaintiff demanded possession of said goods and chattels of said defendants, but said defendants refused to deliver possession of the same or any part thereof, notwithstanding this plaintiff was then and now is entitled to the possession of the same.

5. That said defendants do now wrongfully and unlawfully withhold and detain possession of said property, goods, and chattels from the possession of this plaintiff, to her damage in the sum of two hundred dollars.

Wherefore this plaintiff Sarah J. Fredericks demands judgment against said defendants: 1st. First, for the recovery of the possession of said property, goods, and chattels, or for the sum of two thousand two hundred and thirteen dollars ($2,213.00), the value thereof, in case delivery cannot be had.

150 2. Second, for two hundred dollars damages and for costs of suit.

JOHNSTON & TOOLE, AND
J. H. SHOBER.
Plaintiffs' Attorneys.

MONTANA TERRITORY,
Gallatin County:

Sarah J. Fredericks, being duly sworn, says she is one of the plaintiffs in the above-entitled action, and that she has heard read the foregoing amended complaint, and knows the contents thereof, and that the same is true of her own knowledge.

SARAH J. FREDERICKS.

Subscribed and sworn to before me, this 3rd day of May, A. D. 1876.

JAMES G. DOW,
Notary Public.

And afterwards, to wit, on the 26th day of May, A. D. 1876 the said, defendants filed herein his amended answer, of which said answer, in words and figures, the following is a copy, to wit:

Amended answer.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

Now come the above-named defendants, by their attorneys, and

151 for answer to the amended complaint of the plaintiffs filed herein deny each and every allegation in the said complaint contained.

Defendants deny that on the 8th day of March, A. D. 1875, or at any other time, at the county of Gallatin and Territory of Montana, or elsewhere, the said plaintiff Sarah J. Fredericks was the sole or exclusive owner or possessor in her own right, as sole trader or otherwise, of the goods or chattels set out and attempted to be described in plaintiffs' said complaint. Deny that the defendants or either of them ever at any time wrongfully or unlawfully took said or any goods or chattels from the possession of said plaintiff Sarah J. Fredericks.

Deny that before the commencement of this suit the said plaintiff demanded of defendants the possession of said goods or chattels, or any thereof.

Deny that said plaintiff was or is entitled to the possession of said goods or chattels, or any thereof.

Deny that defendants do now wrongfully or unlawfully withhold or detain possession of said property, goods, or chattels from the possession of the said plaintiff, in her damage in the sum of two hundred dollars or in any other sum.

The defendants, for further answer, aver that on or about the
152 8th day of March, A. D. 1875, the said defendant Charles L. Clark was sheriff of Gallatin County, in said Territory, and that on or about the date last aforesaid, as such sheriff, the said defendant Clark, under and by virtue of two several writs of attachment issued out of the office of the clerk of the district court in said county of Gallatin, one in a case then pending in said court wherein Andrew J. Davis was plaintiff and W. A. Fredericks and W. H. Drew were defendants, and one in a case therein pending wherein the said Andrew J. Davis was plaintiff and Wellington A. Fredericks was defendant, said writs being dated the 6th day of March, 1875, did seize and levy upon, as the property of Wellington A. Fredericks, the defendant in said writs of attachment and one of the plaintiffs herein, certain goods and chattels, consisting of flour and lumber, a portion of which is attempted to be described in plaintiffs' said amended complaint, but a particular description of said property seized by said defendant, as sheriff as aforesaid, is attached to and endorsed on the writs of attachment aforesaid, reference being had thereto.

Defendants further aver that the goods and chattels so levied upon as aforesaid, at the time aforesaid, under and by virtue of the writs aforesaid, were at the time of said levy the property of the said
153 Wellington A. Fredericks, one of the plaintiffs to this action, and that if the said plaintiff Sarah J. Fredericks ever at any time had possession of any of said goods and chattels, or of the goods and chattels set forth in plaintiffs' said amended complaint, the defendants aver that such possession was a fraudulent one, and that the same were held by her for said Fredericks under cover, to conceal the same from the creditors of the said Wellington A. Fredericks, and to defraud the said defendant Andrew J. Davis and other creditors of said Fredericks, and prevent the collection of just debts of said Davis and others against W. A. Fredericks. Defendants deny that the said plaintiff Sarah J. Fredericks has sustained any damage whatever by reason of the acts of these defendants. And having fully answered, the defendants ask to be dismissed, with their costs herein expended.

T. R. EDWARDS & SAM'L. WORD,
Att'ys for Plaintiffs.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

Andrew J. Davis, being first duly sworn, on his oath says that he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the
154 facts therein stated are true of his own knowledge.

(Signed) ANDREW J. DAVIS.

Subscribed and sworn to before me, this May 26th, A. D. 1876.

{ SEAL OF 3D JUD. DIST. COURT OF M. T. } ALEX. H. BEATTIE,
Clerk of the 3rd Jud. District Court, M. T.,
By JNO. N. HELDT,
Deputy Clerk.

And afterwards, to wit, on the 27th day of May, A. D. 1876, the said plaintiff filed herein her replication to the said answer of defendant, which said replication is in the words and figures following, to wit:

Replication.

In first judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

Now comes the plaintiff, and for replication to defendants' answer herein:

1st. Denies that at the time of the levy of the attachment herein, or at any other time, Wellington A. Fredericks was the owner of or had any interest in any of the property mentioned in plaintiffs' complaint herein. Deny that any of said property in plaintiffs' complaint
155 mentioned was ever held by Sarah J. Fredericks for the purpose of covering up the same from defendant A. J. Davis, or any creditor of Wellington A. Fredericks.

3. Deny that said property was ever held by said Sarah J. Fredericks in fraud of any creditor of said Wellington A. Fredericks, or to hinder or delay any creditors of said Wellington A. Fredericks.

Wherefore plaintiff demands judgment, as in her complaint herein prayed for.

JOHNSTON & TOOLE,
J. H. SHOBER, AND
SANDERS & CULLEN.
Attorneys for Plaintiff.

MONTANA TERRITORY,
Gallatin County:

Sarah J. Fredericks, being duly sworn, says she is plaintiff in the above-entitled action, and that she has heard read the foregoing replication and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated on information and belief, and as to those matters she believes it to be true.

SARAH J. FREDERICKS.

Subscribed and sworn to before me, this 27th day of October, A. D. 1876.

J. H. SHOBER,
Notary Public, M. T.

156 And the said Sarah J. Fredericks and Wellington A. Fredericks having commenced this suit in this court against Charles L. Clark and Andrew J. Davis, filed herein their complaint, of which, in words and figures, the following is a copy, to wit: (Here insert same.) Which see at pages 10 to 12.

That thereafter the said defendants filed their answer to said complaint, which said answer is in the words and figures following, to wit: Which see at pages 13 to 18.

That thereafter the said plaintiffs filed their replication to said answer, which said replication is in the words and figures *figures* following, to wit: (Here insert replication.) Which see at pages 19 to 23.

That afterwards, to wit, on the 11th day of May, A. D. 1877, and at the May term, 1877, of this district court, an order was duly made herein consolidating the two foregoing actions. (Here insert order.) Which see at pages 24 to .

157 Said causes thereafter were proceeded with in said court under the title of the causes of "Sarah J. Fredericks and Wellington A. Fredericks, as plaintiffs, and Charles L. Clark and Andrew J. Davis, defendants."

On appeal, the defendants submit the following statement:

SARAH J. FREDERICKS ET AL., PLAINTIFFS,
vs.
CHARLES L. CLARK, SHERIFF, DEF'T,

and

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, def'ts.

Plaintiffs' testimony.

SARAH J. FREDERICKS, one of the plaintiffs, testified as follows, to wit: Which see pages 25 to 29; cross-examination, pages 29 to 31, with exception.

Defendant CHARLES L. CLARK was here introduced as a witness, was duly sworn, and testified, on oath, as follows: Which see at pages 31 to 33.

158 Defendant ANDREW J. DAVIS was then introduced as a witness on part of defendants, was duly sworn and examined on oath, and testified as follows, to wit: Which see testimony at pages 34 to 38.

Defendant Charles L. Clark was recalled on part of defendants, and examined as a witness, and testified as follows, to wit: Which see testimony at pages 38 to 39; cross-examination at page 39.

W. V. RYAN was then introduced as a witness, was sworn and examined, and testified on oath as follows, to wit: Which see testimony at pages 39 to 40; cross-examination at page 39.

MARSHALL COURSIEN was introduced as a witness, duly sworn and examined, and testified on oath as follows, to wit: Which see testimony at page 40; cross-examination at page 40.

C. W. HASKINS was then introduced as a witness, duly sworn and examined, and testified on oath as follows, to wit: Which see testimony at page 40.

Rebuttal testimony by plaintiffs.

ELLISON was introduced, sworn and examined, and testified as follows, to wit: Which see testimony at pages 40 to 42.

JOHN W. GRANNIS was then introduced as a witness, duly
159 sworn as such, and, on examination, testified as follows, to wit: Which see testimony at pages 42 to 43.

MIKE LANE was then introduced as a witness, and testified as follows, to wit: Which see testimony at page 43.

W. V. RYAN was then examined. Which see testimony at page 43.

WATTS. Which see testimony at pages 43 to 44.

Mrs. FREDERICKS. Which see testimony at pages 44 to .

The deed from W. H. Drew to Mrs. Fredericks is here admitted in evidence. Which see at pages 46 to 48.

The pleadings in the title case were here introduced. Which see at pages from 49 (and objected to. Objection overruled, and ruling excepted to).

(Here insert copies of all letters introduced by plaintiff from Davis; also all documentary introduced by plaintiff. Which see affidavit, sole traders, &c., at page 72; receipt of Arick, 76; receipt of Lyman, 76; account of R. E. Arick, 76; account of A. J. Davis at pages 77 to
160 83; receipts of A. J. Davis to W. H. Drew & W. A. Fredericks, 83; lease of A. J. Davis to W. A. Fredericks, 84; deed from A. J. Davis to W. H. Drew and Sarah J. Fredericks, 84 & 85; account of Messrs. Toole & Toole, 85 & 86; letters of plaintiff from A. J. Davis, 86 to 90; agreement of Davis and Drew to build the mill, at pages 91 to 93.

Defendants next introduced in evidence the complaint, affidavit, and writ of attachment based thereon, and the sheriff's return thereon, in the two cases of Andrew J. Davis vs. Wellington A. Fredericks, and Andrew J. Davis vs. Wellington A. Fredericks and William H. Drew, which are in words and figures following: (Here insert the same.)

Which see complaint at pages 93 to 95; summons, 95 to 97; affidavit, 97 to 98; writ of attachment, 98 to 99; sheriff's return, 99 to 100; complaint, 101; summons, 103 to 105; affidavit, 105 to 106; writ of attachment, 106 to 107; sheriff's return, 107 to 109.

161 Defendants next introduced in evidence letters from Wellington A. Fredericks to the defendant Davis—the handwriting and signatures are admitted to be genuine—which are numbered from one (1) to eighteen (18), inclusive, all numbered in red ink, which said letters, from one to eighteen, inclusive, are in words and figures following, to wit: (Here insert said letters.) Which see said letters at pages 109 to page 132.

This court, sitting as a jury in said cause, proceeded after the close of the testimony to find the facts, which finding is in words and figures following, to wit: (Here insert findings.) Which see said findings at pages 132 to page 134.

And the law thereon to the findings of said facts the defendants at the time excepted, because the same is contrary to the evidence and against the weight thereof, and that the conclusions of law found therefrom are erroneous, not supported by the proof in said cause or authorized by the facts so found by the court.

162 That at the same time these defendants submitted findings of fact to said court and requested him to find in accordance therewith, which said findings are in words following: (Here insert the same.) Which see at pages 135 to 138.

Which said findings were refused and rejected by said court. To the ruling of the court in refusing to find in accordance therewith thes' defendants at the time excepted.

That thereafter the said court, on the 1st day of November, 1877, proceeded to render judgment against these said defendants, which said judgment is in words and figures following, to wit: (Here insert the same.) Which see said judgment at pages 139 to page 141.

To the rendering of the said judgment these defendants at the time duly excepted.

The said plaintiffs next offered in evidence the judgment roll and records in the case of Sarah J. Fredericks and Wellington A. Fredericks vs. Andrew J. Davis and Caleb Gilbert, which said judgment roll and records of said cause are in words and figures following, to wit: (Here insert same.) Which see said judgment rolls and records above mentioned at pages 141 to page 146.

163 To the introduction of the same the said defendants objected upon the grounds of irrelevancy, and for the additional reason that the said cause and the judgment rendered therein had been appealed to the supreme court of this Territory, the said cause on appeal not having been determined by said supreme court.

Incorporate all amendments filed November 26th, 1877, and allowed by me Dec. 7, 1877.

HENRY N. BLAKE, *Judge.*

And afterwards, to wit, on the 1st day of November, A. D. 1877, the said defendants filed in the office of the clerk of the said district court their notice of appeal in said cause, which said notice of appeal is in the words and figures following to wit:

Notice of appeal.

In the district court of the 1st judicial district in and for Gallatin County, Montana Territory.

SARAH J. FREDERICKS
vs.
CHARLES L. CLARK, SHERIFF. } 132.

AND

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks
vs.
164 CHARLES L. CLARK AND ANDREW J. Davis. } 166. Notice of appeal.

To the above-named plaintiffs and Messrs. Johnston & Toole and J. H. Shober, their attorneys:

You will please take notice that said defendants in the above-entitled action hereby appeal from the judgment, and every part thereof, rendered in said court on the 1st day of November, 1877, in favor of the plaintiffs and against said defendants, to the supreme court of Montana.

SAM'L WORD,
JAMES G. SPRATT, &
T. R. EDWARDS,
Att'ys for Defendants.

Received copy of the within notice this 1st day of November, 1877.
E. W. TOOLE & J. H. SHOBER,
Att'ys for Plaintiff.

And afterwards, to wit, on the 2nd day of November, A. D. 1877, the said defendants filed in the office of the clerk of the said district court their undertaking on appeal and to stay the execution of the said judgment, which undertaking was on the day and year last aforesaid duly approved by the clerk of the said district court, which said undertaking is in the w'rds and figures following, to wit:

165 *Undertaking on appeal.*

In the district court of the 1st judicial district, in and for Gallatin County, Montana Territory.

SARAH J. FREDERICKS
vs.
CHARLES L. CLARK, SHERIFF, } 132.
AND
SARAH J. FREDERICKS AND WELLINGTON A Fredericks
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS. } 166. } Consolidated.

Whereas the defendants in the above-entitled consolidated actions have given notice to said plaintiffs of their appeal to the supreme court of Montana Territory from a judgment made and entered against said defendants in said consolidated acotins in the said district court in favor of the said plaintiffs in said action, on the 1st day of November, A. D. 1877, for one thousand eight hundred and ninety-six & $\frac{50}{100}$ dollars damages, and four

hundred and thirty-eight dollars costs of suit: Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, resident householders of Gallatin County and Montana Territory,
166 do hereby jointly and severally undertake and promise on the part of the appellants that the said appellants will pay all damages and costs which may be awarded against them on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellants are desirous of staying the execution of the judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake, promise, and do acknowledge ourselves further jointly and severally bound in the further sum of four thousand and six hundred and sixty-nine dollars, being double the amount named in the said judgment, that if the said judgment appealed from, or any part thereof, be affirmed, the appellant shall pay plaintiffs the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal. Interlineations made before signing.

Witness our hands and seals, this 2nd day of November, A. D. 1877.

A. LAMME. [SEAL.]
LESTER S. WILLSON. [SEAL.]

167 TERRITORY OF MONTANA,
Gallatin County, ss:

We, A. Lamme and Lester S. Willson, being duly sworn, each for himself, says that he is a resident householder and a merchant by occupation in said county and Territory, and that he is worth the sum of five thousand dollars over and above all just debts and liabilities and property by law exempt from execution.

A. LAMME.
LESTER S. WILLSON.

Subscribed and sworn to before me, this 2nd day of November, A. D. 1877.

THEO. MUFFLY, *Clerk.*

That afterwards, to wit, on the 15th day of December, A. D. 1877, the said defendants filed in the office of the clerk of said district court their præcipe for transcript on appeal herein, which said præcipe is in words and figures following, to wit:

Præcipe for transcript.

In the district court of the 1st judicial district in & for Gallatin County and Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF, *vs.* CHARLES L. CLARKE, SHERIFF, DEFENDANT, } 132.

168 AND

SARAH J. FREDERICKS AND WELLINGTO' A. FREDERICKS *vs.* CHARLES L. CLARK AND ANDREW J. DAVIS. } 166.

} Consolidated.

To the clerk of the said district court:

You will please make out a transcript of the above-entitled cause for

the supreme court, and insert therein the bill of exceptions and statements on file in said cause, and all papers, orders, judgments, and records inserted or included in said bill of exceptions or statement, or referred to therein, notice of appeal, and undertaking on appeal.

T. R. EDWARDS,
Att'y for Defendant.

TERRITORY OF MONTANA,
County of Gallatin, ss:

I, Theo. Muffly, clerk of the district court of the first judicial district of Montana Territory, in and for the county of Gallatin, do hereby certify that the foregoing 146 pages, numbered from 1 to 146, inclusive, contain a full, true, and correct transcript of certain of the pleadings, records, and proceedings filed, made, and had in said court in the cause of Sarah J. Fredericks, plaintiff, against Charles
169 L. Clark, sheriff, &c., defendant, and Sarah J. Fredericks and Wellington A. Fredericks, plaintiffs, against Charles L. Clark and Andrew J. Davis, defendants, consolidated cases.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Bozeman City, this 8th day of January, A. D. 1878.

{ SEAL DIST. C'T 1 JUD. DIST., GALLAINT CO., M. T. }

THEO. MUFFLY, *Clerk.*
By AMIE J. MALIN,
Deputy Clerk.

170 In the supreme court, Montana Territory, January term, A. D. 1878.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs and respondents,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants & appellants.
} 270.

Be it remembered that in the present term of January, in the year of our Lord one thousand eight hundred and seventy-eight, the above-entitled action was brought into this supreme court from the district court of the first judicial district of said Territory, in and for Gallatin County, by virtue of an appeal from the judgment rendered and entered therein by said district court in favor of said plaintiffs and respondents and against said defendants and appellants, agreeably to the statute of said Territory, and the rules of said supreme court in such case made and provided.

And thereafter, to wit, on the 21st day of January, A. D. 1878, the said appellants filed herein a supplemental transcript of record containing certain findings of fact of the court below in said cause, of which said transcript of record the following is a copy, to wit:

171 *Supplemental record.*

In 1st judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

This cause coming on to be heard before the court this 31st day of

November, A. D. 1877, a jury having been expressly waived by the parties plaintiffs and defendants in open court, and after hearing the evidence in said cause and arguments of counsel for the respective parties plaintiffs and defendants the court finds the following as findings of fact in said cause:

1st. That the plaintiff Sarah J. Fredericks, at the time the said property is alleged to have been taken which is described in the complaint in the two actions consolidated herein, was owner of the following portion thereof as sole trader, and in the possession of the same, to wit: 295 sacks of flour, worth $5.50 per sack; 107 bushels of wheat, and that the same was worth two dollars per bushel; shingles of the value of $10.00; lumber of the value of $50.00. That all of said property
172 was of the value of one thousand eight hundred and ninety-six dollars and fifty cents.

2. That the said property was taken by the defendant C. L. Clark, as sheriff of Gallatin County, by virtue of two writs of attachment procured by defendant A. J. Davis, at the suit of Andrew J. Davis vs. Wellington A. Fredericks and William H. Drew, and Andrew J. Davis vs. Wellington A. Fredericks.

3. That said property was converted by said defendants, and the money realized therefor detained by them.

4. That plaintiff claimed to be the owner of said property in March, A. D. 1875, when the same was taken by defendants, and demanded possession thereof from said defendants in March, A. D. 1875, after the same had been taken by them.

5. The court finds no damages for plaintiff for the detention of said property, and allows the plaintiff no interest on the value of said property from the date of the conversion thereof, which was the 15th day of April, A. D. 1875.

6. That plaintiffs, since January 1, A. D. 1869, have been husband and wife.

The court orders judgment in favor of said plaintiff Sarah J. Fredericks, and against said Charles L. Clark and Andrew J. Davis, for a return of said property, and if return thereof cannot be had, then for the sum of one thousand eight hundred and ninety-six dollars
173 and fifty cents, and for costs of suit.

HENRY N. BLAKE, *Judge.*

TERRITORY OF MONTANA,
County of Gallatin, ss:

I, Theo. Muffly, clerk of the first judicial district court of Montana Territory, in and for the county of Gallatin, do hereby certify that the foregoing on pages from 1 to 3, inclusive, contain a full, true, and correct copy of the court's findings of fact in the case of Sarah J. Fredericks and Wellington A. Fredericks, plaintiffs, against Charles L. Clark and Andrew J. Davis, defendants, and that said findings of fact were omitted in the original transcript to the supreme court of Montana Territory in said cause, which said original transcript is now on file in the office of the clerk of said supreme court.

In witness of which I hereunto set my hand and affix the seal of said court, this 11th day of January, A. D. 1878.

SEAL OF THE DIST. COURT 1ST JUD. DIST., GALLATIN COUNTY, M. T.

THEO MUFFLY, *Clerk,*
By AMIE J. MALIN,
Deputy Clerk.

And on the same day the said appellants filed herein their brief of

points and authorities, of which, in words and figures, the following is a copy, to wit:

174 *Argument of appellant.*

In the supreme court of the Territory of Montana, January term, A. D. 1878.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs and respondents,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants and appellants.

This is an action to recover certain personal property alleged to have been wrongfully taken and withheld by defendants. The answer, denying the averments of the complaint, set up also a fraud on the part of plaintiffs in *in* their claim upon the property; admits the taking of the property by virtue of certain writs, as the property of one of the plaintiffs; avers that the same was fraudulently held and claimed by Sarah J. Fredericks, that her sole tradership, by virtue of which she claimed to hold the property, was a fraud, a trick, and device to cover up the property of plaintiff W. A. Fredericks, and to deceive, defraud, and delay the creditors of W. A. Fredericks, whose property the said answer avers the property in suit to have been at the time of seizure.

(See answer, pp. 11 to 16, inclusive.)

Among the issues presented by the pleadings is one of a fraud on part of plaintiff Sarah J. Fredericks.

175 The court below erred in not finding upon the issue of fraud tendered by the answer and replication. In this the findings are totally defective.

(See Farrar vs. Lyon, 19 Mo., 122; 7 California, 137; 10 California, 411.)

The court fails to find the amount of lumber and shingles taken by defendants; the court only finds the value of an indefinite amount. This is error, and plaintiffs to that extent were not entitled to a judgment.

(See 30th of California, page 419.)

Facts are averred by defendants in their answer materially affecting the rights of the parties, which have been entirely overlooked by the court in its findings, although findings thereon were requested by defendants. This is error, and ground of reversal.

(See Downing vs. Bowlier, 21 Mo., 149.)

The facts put in issue should be found, not the evidence or conclusions of law, and the findings must cover all the issues.

(See Cod. Statutes; Bates vs. Bower, 17 Mo., 550; Walsh vs. Edmonson, 19 Mo., 142; Farrar Lyon, 19 Mo., 122; Javen vs. Harris, 20 Mo., 262; 24 Missouri, 343.)

176 There is no evidence to support the findings of the court as made, and the court should have found on the issues presented, as requested by defendants.

(See transcript, pages 123 to 125.)

There appear two sets of findings in this case, none of which are supported or justified by the evidence.

(Transcript, pages 120 to 122. See supplemental transcript appended.)

The court erred in admitting in evidence the pleadings, record, and judgment-roll in the case of Sarah J. Fredericks and W. A. Fredericks vs. A. J. Davis and Caleb Gilbert, because the said cause was then pending in the courts of the Territory, and no final judgment had been rendered therein.

(See 33 California, page 474.)

The court below, in this case, seems to have deviated from that rule usually observed in courts of law in this country, which allows one party to cross-examine a witness called by the opposite party.

(See transcript, pages 24, 25, 26, and 27.)

The right to cross-examine a witness does not rest in the discretion of the court, but it is a legal right of which a party should not be deprived. In this particular it is respectfully suggested that the court has committed error. Some interesting suggestions as to the right of cross-examination, eminating from respectable legal authority, may be found in 14 Cal., 18. The case was not tried to a jury, and it
177 was the plaintiff herself that the court refused to allow defendants to ask certain questions, many of which were eminently proper and material, and correct cross-examination. Answers to the questions put may have shown that the plaintiffs had really no right or claim upon the property in question.

SAMUEL WORD,
Of Counsel for Defendants.

And afterwards, to wit, on the 23d day of January, A. D. 1878, the said plaintiffs and respondents filed herein their brief of points and authorities, of which, in words and figures, the following is a copy, to wit:

Respondents' brief.

In the supreme court of the Territory of Montana, January term, A. D. 1878.

SARAH J. FREDERICKS ET AL., PLAINTIFFS & respondents,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants and appellants.

The issue of fraud was fully presented and determined by the court in finding that plaintiff, as sole trader, was the owner of, in possession, and entitled to the possession of the property in controversy at the time of the seizure by the sheriff.

178 2. Besides, the court was not requested to find upon the question of fraud. It is true that defendants did ask the court to find affirmatively that there was fraud, but this is not sufficient. It is enough to know that if there was fraud and the property belonged to Fredericks, and was covered up by the plaintiff, it simply affected the question of title, which fact is found in favor of plaintiff. It will be seen that the only finding on the subject offered was that the holding of the property by plaintiff was a trick and device, &c. This the court could not find, and this is what it was requested to do. Had defendant requested the court to find whether or not it was a trick and device, and such finding was not covered in the determination of the right of property, there might be something in appellants' points.

3. It will be seen that the defendants did not request the court to find the value of the lumber and shingles in accordance with section 220, Pr. Act, but the court, on its own motion, did so find. (See record, page 121.)

4. The question of ownership of the mill had nothing to do with the right to the flour. It could make no difference whether the mill was the property of plaintiff or Davis. But it will be seen from the
179 record that defendant went into this question, and the evidence offered by plaintiff was in rebuttal of this immaterial fact. The judgment, however, in which the title to the mill was determined was competent under the rules of evidence. (See Freeman on Judgments, page 291, sec. 328. See Sage vs. Harpending, 49 Barbour, page 166; Harris vs. Hammond, 18 Howard, page 123; Burton vs. Burton, 28 Indiana, 342; Hill vs. Campant, 16 Indiana, 107; Bank vs. Wheeler, 28 Connecticut, 433; Curtis vs. Beardsly, 15 Conn., 518.)

5. Besides, there was no conflict in the evidence. It all showed that Davis, the real party in interest, conveyed the mill to plaintiff, which was exchanged for the one referred to, and advised her to get out her sole-trader papers. (See 52 Barbour, 26; 4 Cowan, 406; 3 John., ch. 354; 5th Wendell, 661.)

6. No objection to this evidence was made on account of the judgment being between different parties. If such objection could be entertained Davis was the real party in interest, and Clark was only an agent. (See Lomme vs. Sweeny, 1 Blake, 598; 22 Wall., 208.)

7. So far as the evidence is concerned it fully supports the case of plaintiffs.

180 8. It will be seen that plaintiff was in possession at the time of the seizure. This was all that was necessary for her to show, as she was not the judgment debtor. (See 3 Barb., 110, Merritt vs. Lyon.)

9. This being the case, the cross-examination sought by defendant was improper. Besides, the order of proof is a matter of discretion with the court, and defendants had the full benefit of an examination of the witness in rebuttal. (See record.)

J. H. SHOBER AND E. W. TOOLE,
Att'ys for Resp'd'ts.

And afterwards, to wit, on the 24th day of January, A. D. 1878, the said cause came on to be heard before the court upon the transcript of record filed herein, and was argued by counsel and submitted. Thereupon the court took said cause under advisement until the next term of this court.

In the supreme court of the Territory of Montana, August term, A. D. 1878.

SARAH J. FREDERICKS ET AL.
vs.
CHARLES L. CLARK ET AL.

181 This cause having been argued and submitted at the January term, A. D. 1878, of this supreme court, and the same having been taken under advisement by the court until this present term, comes regularly on, on this 14th day of August, A. D. 1878, for determination on appeal. Whereupon the court delivers its opinion in writing, which is filed and entered of record, said opinion being in words and figures following, to wit:

In the supreme court of the Territory of Montana, January term, 1878.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs and respondents,
vs.
CHARLES L. CLARK AND ANDREW. J. Davis, defendants and appellants.

Appeal from Gallatin County, first district.

Opinion of the court delivered by Wade, chief justice.

The ownership of certain flour and lumber attached by the defendant Davis as the property of W. A. Fredericks, one of the plaintiffs, and replevied by Sarah J. Fredericks, wife of the said W. A. Fredericks, as her own separate property, is involved herein; the defense resting chiefly upon the allegation that W. A. Fredericks was the owner
182 of the undivided one-half of a certain flouring-mill; that for the purpose of hindering, delaying, and defrauding his creditors he caused the same to be conveyed to his wife, Sarah J. Fredericks; that the flour and lumber in question were the profits and proceeds of such mill after such conveyance, and therefore the property of the husband; and this claim of fraud in such conveyance having been set at rest in the case of Fredericks vs. Davis and Gilbert, decided at this term (3 Mon., page), wherein it was finally determined and adjudged that Sarah J. Fredericks, by virtue of the conveyance aforesaid, became the bona fide owner of the undivided one-half of said mill, and as such owner entitled to partition thereof, there is not much left to try in this action.

The case was tried to the court without a jury, and one of the errors complained of by the defendant is that the findings of fact do no cover the issue of fraud raised in the pleadings. Undoubtedly the findings should be as broad as the issues. The defendant having charged that the plaintiff Sarah J. Fredericks held and claimed the property mentioned in the complaint in order to cover it up, and for the purpose of cheating and defrauding the creditors of her husband, and the court having found that said Sarah J. Fredericks was the owner of the property as sole trader, and that the same was wrongfully seized by
183 the defendant Clark, sheriff, as the property by her husband, at the suit of Davis, we do not see but the finding is as broad as the issue, and conclusively covers the question of fraud raised in the pleadings.

2. The case of Fredericks vs. Davis and Gilbert, wherein title to the mill property had been adjudicated, was determined in the district court, and an appeal to the supreme court pending therein, when the pleadings, record, and judgment roll in that case were admitted in evidence in this one to rebut the attack of the defendant on the title of plaintiff, and such admission is assigned as error. If this had been error it is not such an one as ought to reverse the case, for since the affirmation in the supreme court of the judgment so introduced, whereby upon a second trial such judgment would become competent evidence, a reversal of the case would work no advantage to the defendant. But we do not think that an appeal may be considered as suspending the operation of a judgment so that it is not admissible as evidence in any controversy between the parties. Until reversed or annulled the judgment is binding upon the parties, as to every question decided, directly, and an appeal, with a proper bond, to stay proceedings only suspends
184 the right to execution. "If the appeal is in the nature of a writ of

error, conferring power on the appellate court to determine such errors as may have occurred at the trial or in the decision of the cause, and giving the court upon such determination no other authority than that of reversing, modifying, or affirming the judgment of the inferior court, and of remitting the case back to the tribunal whence it came, that such tribunal may conform its judgments and proceedings to the views of its superior, then the judgment appealed from does not, until vacated or reversed, cease to operate as a merger and bar." (Freeman on Judgments, sect. 328, and cases cited.)

There was no objection to the judgment because it was not between the same parties, nor could such objection have been made, for it was between the same parties in interest, and determined the title to the mill property as between W. A. and Sarah J. Fredericks, the very question that Davis sought by his attack upon the title of Sarah J. to have tried again in this action.

3. The defendant, as often happens, sought to make out his defense on the cross-examination of plaintiffs' witness. The refusal to permit this where the examination-in-chief had not opened the door was not error. Even if the defendant had been entitled to the proposed cross-examination of Sarah J. Fredericks he was not in any manner injured, for when she came again to the witness stand in rebuttal the examination took place, and, juding from her testimony, covered all the questions proposed upon her former examination.

185

The judgment is affirmed, with costs.

DECIUS S. WADE,
Chief Justice.
HIRAM KNOWLES,
Asso. Justice.
HENRY N. BLAKE,
Asso. Justice.

Thereupon judgment on appeal was entered in this cause in the following words, to wit:

Judgment on appeal.

In supreme court, Aug. term, 1878.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs and respondents,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants and appellants.
} 270.

Whereas in the present term of August, in the year of our Lord one thousand eight hundred and seventy-eight, this cause came on in said supreme court for determination on appeal; whereupon it is now here ordered and adjudged by this court that the findings and judgment of the district court of the first judicial district of this Territory, in and for the county of Gallatin, entered in this cause on the 30th day of October, A. D. 1877, be, and the same is hereby, affirmed, with costs. And it is further ordered by this court that the said plaintiffs, Sarah J. Fredericks and Wellington A. Fredericks, respondents herein, recover against the said defendants and appellants, Charles L. Clark and Andrew J. Davis, dollars, for their costs herein expended, and have execution therefor.

186

Judgment on appeal entered Aug. 14, 1878.

And thereafter, to wit, on the 19th day of August, A. D. 1878, this cause came on to be heard before the court on the application of appellant Davis for a writ of error herein to remove said cause to the Supreme Court of the United States; whereupon it is ordered that such writ of error be allowed, and that the penalty of the bond on appeal to accompany such writ be, and the same is hereby, fixed at the sum of five thousand dollars.

187 And on the 23rd day of August, A. D. 1878, the said appellant, Andrew J. Davis, filed in the clerk's office of the supreme court of Montana Territory his writ of error to remove this cause to the Supreme Court of the United States, which said writ of error is in words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the Territory of Montana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court before you between Sarah J. Fredericks and Wellington A. Fredericks, plaintiffs, and Andrew J. Davis and Charles L. Clark, defendants, a manifest error hath happened to the great damage of the said Andrew J. Davis and Charles L. Clark, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States,

188 together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable M. R. Waite, Chief Justice of the said Supreme Court, the second Monday of October, in the year of our Lord one thousand eight hundred and seventy-eight.

{ SEAL OF SUP. C'T, M. T. }

I. R. ALDEN,
Clerk of the Supreme Court Montana Territory.

Allowed by—

DECIUS S. WADE,
Chief Justice of Supreme Court Montana Territory.

And on the same day, to wit, the 23rd day of August, A. D. 1878, the said appellant filed herein his citation, of which, with the affidavit of service thereof endorsed thereon, the following is a copy, to wit:

Citation.

SARAH J. FREDERICKS AND WILLINGTON A. Fredericks,
vs.
ANDREW J. DAVIS AND CHARLES L. CLARK.

189 The United States of America, greeting:

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Montana, wherein Andrew J. Davis and Charles L. Clark are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable D. S. Wade, chief justice of the supreme court of the Territory of Montana, this 23rd day of August, in the year of our Lord one thousand eight hundred and seventy-eight.

{ SEAL OF SUPREME C'T, M. T. } DECIUS S. WADE,
Chief Justice.

Endorsement of service.

I hereby certify and return that on the 26th day of August, 1878, in my district, to wit, at Helena, in the county of Lewis and Clarke, and Territory of Montana, I personally served the within citation on
190 E. W. Toole, esq., one of the attorneys of the defendants in error herein, by showing the same to him, with the seal of the court attached, and at the same time delivering to and leaving with him a true copy thereof.

Dated Helena, M. T., Aug. 26, 1878.

ALEX. C. BOTKIN,
U. S. Marshal, Dist. of Montana.

Fees: Service, $2.00; copy, 20—$2.20.

And on the same day, to wit, the 23rd day of August, A. D. 1878, the said appellant Andrew J. Davis filed herein his bond, with sureties as required by law, to accompany the writ of error in this cause, in the sum of five thousand dollars, the penalty fixed by the order of court made and entered August 19, 1878, of which said bond, in words and figures, the following is a copy, to wit:

Know all men by these presents that we, Andrew J. Davis, as principal, and Samuel T. Hauser, and Anton M. Holter, as sureties, are held and firmly bound unto Sarah J. Fredericks and Wellington A. Fredericks in the sum of five thousand dollars, lawful money of the United States of America, to be paid to the said Sarah J. Fredericks and
191 Wellington A. Fredericks, their executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally firmly by these presents. Sealed with our seals and dated the twenty-first day of August, A. D. one thousand eight hundred and seventy-eight.

Whereas lately in a suit, at the August term of the supreme court of the Territory of Montana, depending in said court between Sarah J. Fredericks and Wellington A. Fredericks, plaintiffs, and Andrew J. Davis and Charles L. Clark, judgment was rendered against the said Andrew J. Davis and Charles L. Clark, and the said Andrew J. Davis and Charles L. Clark has sued out a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Sarah J. Fredericks citing and admonishing her to be and appear at a Supreme Court of the United States to be holded at Washington on the second Monday of October next:

Now the condition of the above obligation is such that if the said Andrew J. Davis and Charles L. Clark shall prosecute their said writ of error with effect, and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be
192 void, else to remain in full force and virtue.

A. J. DAVIS. [SEAL.]
S. T. HAUSER. [SEAL.]
A. M. HOLTER. [SEAL.]

Signed, sealed, & delivered in the presence of—

Approved by—

DECIUS S. WADE,
Chief Justice of the Supreme Court of Montana Territory.

TERRITORY OF MONTANA,
Lewis and Clarke County, ss:

Samuel T. Hauser and Anton M. Holter, being first severally duly sworn, each for himself, deposes and says that he is worth the sum named in the within bond as the penalty thereof, over and above all his just debts, liabilities, and exemptions, and that he is a resident and freeholder in the Territory aforesaid.

S. T. HAUSER.
A. M. HOLTER.

Subscribed and sworn to before me, this 23rd day of August, A. D. 1878.

[NOTARIAL SEAL.] WM. CHUMASERO,
Notary Public.

193 In the supreme court, Montana Territory, August term, A. D. 1878.

CHARLES L. CLARK AND ANDREW J. DAVIS, plaintiffs in error,
vs.
SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, defendants in error.

I, I. R. Alden, clerk of the supreme court of Montana Territory, do hereby certify that the foregoing one hundred and ninety-two pages, numbered from one to one hundred and ninety-two, contain a full, true, and correct transcript of certain pleadings, records, and proceedings filed, made, and had in the above-entitled action, as the same appear on file and of record in my office.

Witness my hand and the seal of said court, this first day of October, A. D. 1878.

[SEAL.] I. R. ALDEN, *Clerk.*

(Indorsement on cover:) No. 178. Andrew J. Davis and Charles L. Clark, plaintiffs in error, vs. Sarah J. Fredericks and Wellington A. Fredericks. Montana Territory, supreme court. Filed 19th April, 1879.